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Chairman: Mr. Bennouna ..... (Morocco)
later: Mr. Simon (Vice-Chairman) ..... (Hungary)

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04-59599 (E)

The meeting was called to order at 9.45 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Mr. Peh** (Malaysia), referring to the draft articles on responsibility of international organizations, said that in draft article 1, paragraph 2, the word "international" should be inserted before "responsibility", and the phrase "of which the State is a member." should be added at the end of paragraph. In draft article 2, for the purpose of clarity, the term "other entities", should be defined clearly or, alternatively, certain criteria should be specified. With respect to draft article 6, relating to *ultra vires* conduct of organs or agents of an international organization, due consideration should be given to the validity of the conduct of the organs or agents prior to attributing that conduct to the organization. It would be unjust to attribute the conduct to the organization when the conduct had clearly exceeded the authority of the organs or agents, or when it obviously contravened the instructions of the organization.

2. Turning to the draft articles on shared natural resources, he welcomed the Special Rapporteur's second report (A/CN.4/539), and noted that due to the sensitivity expressed concerning the term "shared resources", the draft articles focused on the sub-topic "transboundary groundwaters", without using the term "shared". He also noted that although "groundwater" was used in the Special Rapporteur's report, the preferred term in the draft articles was "aquifer".

3. Since the draft articles sought to regulate the use, protection, preservation and management of transboundary aquifer systems, Malaysia wished to propose amendments to draft article 2. In paragraph (a), the phrase ", sand, gravel, or soil" should be inserted after "formation", and in paragraph (b), "sand, gravel, or soil" should be inserted after "formations,".

4. With regard to draft article 4, his delegation would welcome clarification of the concept of "significant harm" and of the criteria for determining when "harm" constituted "significant harm".

5. In relation to draft article 6, the exchange of certain data and information might be inappropriate, as it might have adverse implications for the national interest of an aquifer system State. He therefore proposed that such exchanges should be made subject to national interest considerations, including security.

6. **Mr. Loizaga** (Paraguay), referring to chapter VI of the Commission's report, expressed support for the Special Rapporteur's proposal to focus on the sub-topic "transboundary groundwaters" without using the term "shared". He welcomed the observation in paragraph 115 of the report that groundwaters must be regarded as belonging to the State where they were located, along the lines of oil and gas, and could not be considered a universal resource. As a Guarani aquifer system State, Paraguay attached great importance to that concept of ownership, which also involved the principle of permanent sovereignty over natural resources, as embodied in General Assembly resolution 1803 (XVII).

7. In that regard, he referred to the ad hoc high-level working group on the Guarani aquifer set up by the States members of the South American Common Market (MERCOSUR) to draft an agreement to establish the principles and criteria to safeguard the rights of those States over their groundwater resources. He noted in that connection, that the member States had adopted basic principles regarding the Guarani aquifer, stating their position that groundwaters belonged to the territorial dominion of the State under whose soil they were located and that the Guarani aquifer was a transboundary aquifer belonging exclusively to the four MERCOSUR countries. Furthermore, the four-year, World Bank-sponsored technical project on the environmental protection and sustainable development of the Guarani aquifer system was expected to improve understanding of that important natural resource. Paraguay and the other MERCOSUR member States were convinced that the technical data they would continue to provide would be crucial to the elaboration of documents by the Commission, fully upholding the principle of the sovereignty of States over their natural resources.

8. **Ms. McIver** (New Zealand), referring to the topic "responsibility of international organizations", said that the conduct of organs or agents placed at the disposal of an international organization included the situation of peacekeeping forces, and that the attribution of conduct to the international organization or relevant State was a potentially difficult issue. New Zealand supported the test of effective control, as favoured by the Commission in draft article 5.

9. In response to the Commission's request for comments on specific issues relating to the Special Rapporteur's next report, and with regard to the question raised in paragraph 25 (a) of the Commission's report, she said her delegation believed that the Commission should not delve too deeply, if at all, into the question of breaches of obligations that an international organization might have towards its member States or agents under the rules of the organization.

10. With regard to the question mentioned in paragraph 25 (b), her delegation had some concerns about necessity being invoked by a State as a ground for precluding the wrongfulness of an act that would otherwise be contrary to international law. Any suggestion that an international organization could invoke necessity in similar circumstances would be even greater cause for concern, as her delegation had difficulty envisaging what could constitute the "essential interest" of an international organization that could be protected against a "grave and imminent peril".

11. With regard to the question referred to in paragraph 25 (c), concerning the responsibility of an international organization in connection with the wrongful act of a State or another organization, her delegation considered that the organization and the State should both be regarded as responsible under international law, even if the State's wrongful conduct was not specifically requested, but only authorized, by the organization.

12. Turning to the topic "Shared natural resources", she said that as a remote island country, New Zealand did not have transboundary groundwaters, but was nonetheless aware of the importance of such resources in many parts of the world. The subject involved a high level of scientific and technical complexity and her delegation wished to assure the Special Rapporteur of its continued support for the success of his work in that regard. Although New Zealand, having no transboundary aquifers, was not in a position to provide information about their allocation and management, her delegation wished to make some general comments of relevance to the general framework proposed by the Special Rapporteur and the principles to be incorporated in the draft articles. Since the characteristics of most aquifers differed vastly from those of surface waters, which were covered by the 1997 Convention on the Law of the Non-navigable Uses of International Watercourses, and since pollution of aquifers might prove particularly difficult to clean up, the question arose as to whether the principles and rules relating to those aquifers should place greater emphasis on environmental protection and pollution prevention.

13. Lastly, she observed that the principles of equitable use and reasonable utilization were not easy to apply in relation to an aquifer system that received no recharge and was therefore non-renewable. It was not clear how meaning could be attributed to that concept in that context but consideration might be given to the idea that transboundary aquifers should be utilized at rates commensurate with the ability of the States concerned to ensure alternative water supplies for their people.

14. **Ms. Huh** Jung-ae (Republic of Korea), referring to the draft articles on responsibility of international organizations, said her delegation accepted draft article 4, paragraph 3, but felt that the definition of "rules of the organization" in paragraph 4 was unclear. It believed that "decisions, resolutions and other acts taken by the organization" were equivalent to the concept of established practice of the organization.

15. In addition, it wondered whether "other acts taken by the organization", without any further qualification, could be regarded as amounting to rules of the organization. It proposed that the Commission should explore whether certain conditions might be necessary for such acts to constitute rules of the organization. An analogy could be drawn in that connection with the *North Sea Continental Shelf Cases*, in which the International Court of Justice had observed that State practice must have been both extensive and virtually uniform in order to constitute a settled practice under customary international law.

16. Concerning draft article 5, her delegation considered that the test of effective control in relation to the question of attribution must reflect the development of recent jurisprudence on that issue. In the *Military and Paramilitary Activities in and against Nicaragua case*, the International Court of Justice had outlined the test of effective control, according to which a State must have issued specific instructions and directions to its agent regarding the commission of specific acts, in order for the acts of that agent to be attributable to that State. By contrast, it was noteworthy that the Appeals Chamber of the

International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Dusko Tadic* case had held that the effective control test propounded by the International Court of Justice was at variance with international judicial and State practice. The Chamber had therefore held that the less stringent test of "overall control" by a State was sufficient to attribute the acts of any hierarchically organized groups, such as armed forces, to that State. The overall control test did not go so far as to require the issuance of specific orders for specific acts but required a State's supervision and planning of acts of an agent or organization.

17. Her delegation therefore proposed that the Commission should give further thought to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in order to determine an adequate criterion for the attribution of conduct to an international organization. Furthermore, the test of control would be pivotal in resolving the question of attribution of the conduct of a State's organ arising from the situation envisaged in draft article 5, either to that State or to an international organization. Paragraphs (9) and (10) of the commentary to draft article 5 seemed to imply that acts by an organ of a State could be imputable to that State, provided that an international organization did not exercise "exclusive command and control" over the organ. Her delegation therefore suggested that the Commission should formulate two separate provisions in draft article 5 based on the threshold of control by an international organization over a State's organ: the first should cover attribution of the acts of an organ of a State to an international organization, and the second should cover attribution of the act of an organ of a State to that State. Further study of international case law, State practice and the established practice of international organizations was necessary if two provisions were to be formulated.

18. **Ms. Zanelli** (Peru) commenting on the topic "Shared natural resources", commended the Special Rapporteur's decision to focus on the sub-topic "transboundary groundwaters", without using the term "shared", thus taking into account the concerns expressed about potential misconceptions to which use of that term might give rise relating to the concepts of the common heritage of mankind and shared ownership. Peru wished to reiterate the importance of the sovereignty of States over their natural resources, and specifically over resources underlying their territory. The draft articles should state, possibly in the preamble, that groundwaters belonged exclusively to the State in whose territory they were located, and that such States had dominion over them.

19. With regard to the final form of the draft articles, Peru would prefer guidelines which could be used by States in setting up bilateral or regional arrangements or agreements, taking into account the particular characteristics of each situation and the existence of prior agreements.

20. Peru would continue to accord special attention to the topic and was currently preparing its reply to the Commission's questionnaire with a view to supporting the work on the codification of State practice in that area.

21. With regard to chapter XI of the Commission's report, entitled "Other decisions and conclusions of the Commission", her delegation supported the Commission's decision to include the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work because of that topic's importance in establishing the rule of law and combating impunity.

22. **Ms. Zabolotskaya** (Russian Federation) said that the responsibility of international organizations was a topic of great practical significance. The Commission was right in maintaining that the conduct of an organ or agent of an international organization in the performance of their functions must be deemed an act of that organization, a view that was supported by the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*. The inclusion of the criterion of effective control in draft article 5 had been an important step. The criterion for the attribution of conduct to an international organization employed in draft article 6 seemed to differ from that used in draft article 4; it might therefore be advisable to apply the criterion laid down in draft article 4, paragraph 1, to all conduct. It was unclear why the Commission, when defining the notion of the "rules of the organization" in draft article 4, paragraph 4, had departed from the perfectly satisfactory definition given in article 2 (j) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Draft article 7 posed no problems, since the focus on the attribution of

responsibility rather than on wrongful conduct was correct.

23. Turning to the questions raised in paragraph 25 of the report, on which the Commission had requested the Committee's guidance, and referring to paragraph 25 (a), she said that the constituent instruments of international organizations were indubitably part of international law and, that being so, a breach by an international organization of its obligations to its member States and, possibly to its agents, could entail the organization's responsibility under international law. While there seemed to be no grounds for excluding that topic from the draft articles, it was unnecessary to immediately draft special provisions on it with regard to paragraph 25 (b), it was impossible to rule out the possibility that an international organization might, at some time, have to rely on necessity as a circumstance precluding wrongfulness, for example in order to prevent damage to the territory of States hosting a nuclear research facility where extremely hazardous research was being undertaken by the organization. Concerning paragraph 25 (c), in the event of an international organization requesting a member State wittingly to carry out a wrongful act, it was obviously possible to speak of the joint responsibility of the international organization and the member State, but the position would be different if the international organization's request had not called for the wrongful conduct in which the member State had engaged. On the other hand, if a member State's wrongful conduct had been authorized by an international organization, even *ex post facto*, that would also give rise to the joint responsibility of the organization and the State.

24. **Ms. De Armas García** (Cuba), referring to the topic "Responsibility of international organizations", said that, although the Commission had adopted the appropriate method when drawing up the four draft articles on the attribution of conduct, the definition of "international organization" in draft article 2 departed from that to be found in article 2 (i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Moreover the reference to "other entities" constituted a progressive development of the subject matter which was not consonant with international practice. For those reasons, it would be advisable for the draft articles to return to the more restrictive wording of the 1986 Convention.

25. With reference to paragraph 25 (a) of the Commission's report, it would be useful for the Commission to consider breaches of obligations that an international organization might have towards its member States or agents, since by studying that topic, the Commission would enhance legal security in relations between States and international organizations of which they were members. With regard to paragraph 25 (b), an international organization should, in principle, be able to invoke necessity as a circumstance precluding international responsibility for a wrongful act when such an act would be the only means of safeguarding the interests of the organization against a grave and imminent peril, but the Commission would have to ensure that the wording it chose would rule out the indiscriminate use of the concept as a means of justifying other wrongful acts of international organizations. The text of draft article 25 on State responsibility offered a good basis for the drafting of such a provision. Concerning paragraph 25 (c), an international organization should, generally speaking, be responsible for wrongful acts committed by one or more of its member States in compliance with a request on the part of the organization. In fact, both the member State and the international organization should be held responsible. On the other hand, if the wrongful act of a State was not requested, but merely authorized by the organization, it would be necessary to analyse the extent of the organization's participation in the wrongful act before deciding whether it was responsible for the State's conduct. If the wrongful act had been carried out by the State on its own behalf and on that of the organization with the latter's prior authorization, the organization should be held jointly responsible, but if authorization had been given *ex post facto* it would be essential to look at the organization's rules in order to ascertain its relationship with its member States. Those issues should be dealt with in the third report.

26. **Mr. Rodiles Bretón** (Mexico), referring to chapter V of the Commission's report, said that the draft articles on the attribution of conduct to international organizations would help to consolidate the general rules on the subject. The definitions of "agents" and "rules of the organization" in draft article 4 ought to be moved to draft article 2, as suggested in the report, since those terms had normative implications for the draft articles as a whole. Although doubts had been expressed as to whether effective

control was an acceptable criterion for attributing the conduct of organs or agents placed at the disposal of an organization, his delegation considered it to be the most objective and effective one. There might, of course, be cases in which it would be hard to attribute conduct on that basis, but practice and the rulings of international courts would probably make it possible to overcome those difficulties.

27. Turning to the issues on which the Commission had requested Member States' views, in paragraph 25 of the report, he said with regard to paragraph 25 (a) that the Commission should consider breaches of obligations that an international organization might have towards its member States or its agents, insofar as those obligations were not delimited solely by the rules of the organization but constituted obligations under international law. With regard to paragraph 25 (b), while necessity would generally preclude the international responsibility of an organization for a wrongful act, the circumstances in which necessity could be invoked would have to be even more exceptional than those applying to a State, since the essential interests of an organization could not be equated with the essential interests of a State. It was therefore doubtful whether the inclusion of that issue was advisable. The question raised in paragraph 25 (c) was very difficult and, although his Government was inclined to consider that the State and the organization would be responsible in both cases, it agreed that the question required more careful consideration.

28. Turning to chapter VI of the report, he said that the Commission's work on shared natural resources would help to fill the considerable gap in international law on the subject. Transboundary groundwaters were of such importance that they should be tackled before oil and gas. His Government had joined in efforts to conserve them by adopting the National Water Act which established mechanisms for ensuring better use of water.

29. The 1997 Convention on the Law of the Non-navigational Uses of International Watercourses could serve as the basis for broaching the subject of transboundary groundwaters, particularly in respect of the application of general principles of cooperation and measures for preventing, reducing and controlling pollution. Nevertheless, once the scope of the Commission's work had been defined, a special regime would have to be devised for transboundary aquifers which were non-renewable or slow to recharge. The general framework proposed by the Special Rapporteur was therefore an acceptable starting point, but it would have to evolve as work progressed. The use of the term "transboundary aquifer systems" and the elimination of the terms "confined", "unrelated" and "not connected" had been judicious and an article on the relationship between the new aquifers regime and the regime under the 1977 Convention might remove any quandaries as to the application of the Convention to aquifers.

30. The principles governing the uses of aquifer systems should be analysed with care to ensure that they were appropriate. The principle of equitable use should certainly be included, although it would be preferable to speak of "equitable exploitation". The principles of reasonable utilization, optimum use and participation by States should be studied in depth, because those resources, unlike surface waters, were non-renewable or slow to recharge. Furthermore, it was important to include a reference to the principle of sustainable use. The obligation not to cause harm could be incorporated in the part concerning the prevention of pollution and the protection of aquifers. Draft article 4 focused on harm caused to aquifer system States and did not pay sufficient heed to the protection of the aquifer and the water it contained. Moreover, the article should also specify, in the event of irreparable damage to a transboundary aquifer, what type of responsibility might be entailed and the conditions on which affected States might claim compensation. With regard to draft articles 5 and 6, concerning respectively the obligation to cooperate and exchange of information, both articles should contain a reference to the importance of capacity-building in those areas and to the need to cooperate and exchange information about matters connected with environmental protection and the sustainable use of aquifers.

31. **Mr. Hmoud** (Jordan), referring to chapter V of the report, said that the Commission's work was valuable since there was little jurisprudence offering guidance on the issue of the responsibility of international organizations. Although it had been a good idea to approach the topic by codifying existing customary rules and judicial principles, while at the same time developing new rules where necessary, the Commission should not rely too heavily on unpublished or internal memorandums of organs of international organizations as indication of established practices.

32. The approach adopted in draft articles 4 to 7 was welcome. The focus on conduct rather than responsibility would make it possible to separate the issue of attribution from that of the content and consequences of responsibility. An explicit provision on dual or multiple attribution should be included in the draft articles in order to avoid possible complications in the future with regard to the interpretation or implementation of the draft articles. Draft article 4, paragraph 3, should be recast to make it clear that the rules of the organization were not the sole means of determining the functions of an organization's organs and agents. A factual test to ascertain whether an agent was entrusted with the performance of functions of that organization as a means of deciding whether its conduct could be attributed to the organization was the test applied by the International Court of Justice and was definitely preferable to the official status test, and its inclusion in that article and in draft article 5 was therefore welcome. If the circumstances indicated that an organization had exercised effective control over the conduct in question, the latter should be attributed to the organization, notwithstanding any formal assertion or agreement to the contrary. However, the factual test should apply not only to the conduct but also to whether the organ or agent had been placed at the disposal of the international organization. The commentary to draft article 5 inadvertently confused the issue of command of the organ or agent with that of effective control over the conduct. It might be advisable to replace the term "at the disposal of" in draft article 5 with "under the effective control of". Draft article 5 likewise failed to answer the question of attribution in the case of a joint operation where it was hard to distinguish between areas of effective control. While draft article 6 had correctly established the principle that ultra vires acts by an organ or agent should be attributable to the international organization, it was unfortunate that the commentary dwelt on the distinction between on-duty and off-duty conduct, as that confused the test established in that article, which was whether the organ or agent was acting in that capacity and whether it had exceeded its authority or contravened instructions. The content of draft article 7 should be reconsidered, as it contradicted the factual test for attribution. There did not appear to be any useful reason to attribute an act to an international organization which acknowledged or adopted the conduct as its own, nor was there any jurisprudence or practice to support that approach.

33. **Ms. Masyruby** (Venezuela) said that her delegation supported the Special Rapporteur's proposal not to use the imprecise term "shared natural resources" (A/59/10, para. 83), whose interpretation might give rise to serious disagreements. Venezuela had always argued against the use of the term in legal instruments adopted by the international community.

34. **Ms. Odaba-Mosoti** (Kenya) said that the Special Rapporteur's initial work on shared natural resources formed a solid basis for further consideration of what was a complex topic; her delegation commended his approach of focusing on transboundary groundwaters.

35. While the Convention on the Law of the Non-navigational Uses of International Watercourses provided the basic principles for guiding the Commission's work, it had so far received little support from States; replication of those principles might therefore be counterproductive, especially with regard to fossil aquifers, which were expressly excluded from the scope of the Convention. On the other hand, some underground water systems were linked with surface waters, in which case the principle of the Convention would remain relevant.

36. More attention should be given to the management and sharing of confined aquifers, taking into account their non-renewable nature. It might be worth considering whether non-renewable underground water resources should be governed by the same sort of regime as governed other depletable shared natural resources and deciding which rules of international environmental law would be applicable to them.

37. A comprehensive study of State practice might be a useful point of reference for the future work. It was to be hoped that the replies to the Special Rapporteur's questionnaire would provide some useful insights. The outcome of the work might take the form of a framework document or guiding principles to enable States to elaborate specific national and regional arrangements.

38. **Ms. Telalian** (Greece), referring to chapter V of the report, said that the four new draft articles on responsibility of international organizations appeared to be adequately formulated. Her delegation welcomed in particular the adoption in draft article 4, paragraph 2, of a broad definition of agent of an

international organization, based on the advisory opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*, which emphasized not only the official character of the agent but also the fact that he was a person through whom the organization acted. The definition was further clarified by article 4, paragraph 1, which excluded private actions of the organ or agent from attributable conduct. She welcomed the inclusion in article 4, paragraph 4, of "other acts taken by the organization" and its "established practice" on part of the corpus of law constituting the rules of the organization. Those two elements would be invaluable in determining the functions of organs and agents.

39. The inclusion in draft article 5 of the criterion of effective control was also welcome, for the criterion was deeply rooted in the practice of the United Nations within the framework of peacekeeping operations. If an act of a peacekeeping force was imputable to the United Nations and violated international law, it would entail the international responsibility of the Organization and its liability for compensation. The criterion would also be decisive in the case of joint or concurrent attribution.

40. The Commission had stressed that draft article 6 covered both conduct exceeding the competence of the organization and conduct exceeding the authority of its organ or agent, but the text covered explicitly only the second case. However, the Commission was right to argue that such conduct was attributable to the organization when linked with the organ's or agent's official functions. The Commission was also correct in stating, with regard to draft article 7, that the competence of the international organization was governed by its own rules.

41. Turning to the questions on which the Commission had requested the views of States, she said, with regard to paragraph 25 (a) of the report, that the Commission should indeed consider possible breaches by an international organization of its obligations towards its member States. The rules of an organization formed part of the international legal order, for they derived from an international treaty, i.e. the constituent instrument of the organization. A breach of an organization's rules thus entailed the international responsibility of the author, just as any breach of any other international norm. Moreover, the Commission had concluded, with respect to the responsibility of States for internationally wrongful acts, that the origin of the international obligation breached was of no consequence to the international responsibility of the State committing the wrongful act. A different approach with regard to the responsibility of international organizations would disturb the unified regime on the origin of international obligations.

42. On the other hand, the violation of the rules of an organization with respect to its agents merited a more nuanced approach, for private persons were not subjects of international law and could not assert the fulfilment of any other international obligations, except for the obligations of other subjects of international law stemming from the rules on the protection of human rights. A distinction should therefore be made between the violation of rules of an organization incorporating such human rights rules and the violation of other rules governing the organization's agents. The violation of those latter rules should constitute the object of a complaint only to the extent and within the mechanisms provided by the organization itself, whereas violation of the former rules should constitute the object of a complaint outside the framework of the organization, in accordance with the procedures of general international law. The Commission should therefore consider only violations in the first category.

43. With regard to paragraph 25 (b), her delegation would be reluctant, given the lack of relevant practice, to include in the draft article at the current stage the plea of necessity as a circumstance precluding wrongfulness in connection with the responsibility of international organizations.

44. The third question, set forth in paragraph 25 (c), raised issues requiring further definition. When a State acted to implement a measure which it was obliged to implement under the rules of the organization, the organization might be held responsible if the measure violated a rule of international law. Her delegation therefore endorsed the view expressed by the Special Rapporteur in paragraph 12 of his report (A/CN.4/541) that the attribution of international responsibility might be distinct from the attribution of wrongful conduct of a person towards a subject of international law. The Commission had worded the question correctly: in order for the organization to be regarded as responsible under international law, the organization itself, and not only its member States, must be independently bound by the obligation breached. If only the member State had assumed the obligation breached by the measure taken by the organization, the organization could not

be held responsible. The question of the possible exclusion of a State from responsibility in that respect should therefore be treated under the law of the international responsibility of States and not included in the current project.

45. **Mr. Melescanu** (Chairman of the International Law Commission), introducing chapters VIII, IX and X of the Commission's report, and referring first to chapter VIII, said that, in accordance with the recommendations of the Working Group on Unilateral Acts of States, the Special Rapporteur had taken into account in his seventh report (A/CN.4/542 and Corr.2 and Corr.3) the need to identify the relevant rules for codification and progressive development. The report dealt in particular with acts and declarations producing legal effects and with conduct which could have legal effects similar to unilateral acts. In order to determine the criteria for the classification of acts and declarations, the Special Rapporteur had used three generally established categories: acts by which a State assumed obligations (promise and recognition); acts by which a State waived a right (waiver); and acts by which a State reaffirmed a right or a claim (protest). Although notification was formally a unilateral act, its effects varied with the situation to which it referred. The Special Rapporteur's conclusions were designed to facilitate the consideration of the topic and the identification of generally applicable principles.

46. The debate in the Commission had shown that, although the seventh report gave several examples of unilateral acts, a more rigorous analysis would be required before it could be concluded that there were generally applicable rules. Furthermore, since there were few studies analysing the context essential to an understanding of unilateral acts, the Commission had to concentrate on examining some examples and trying to draw up a comparative table with a view to identifying rules common to those examples. The Working Group had continued to work on the basis of the recommendations made in the previous year with a view to providing guidance for the future work. It had decided to select a sample of unilateral acts sufficiently documented to allow for an analysis in depth. It had also established a grid, described in paragraph 247 of the Commission's report, permitting the use of uniform analytical tools. The members of the Working Group had shared out a number of studies to be effected in accordance with the grid and transmitted to the Special Rapporteur before 30 November 2004. The synthesis based exclusively on those studies would be entrusted to the Special Rapporteur, whose conclusions would be presented in his eighth report.

47. The lack of information on State practice was a major difficulty of the topic. The Commission had thought that the study of such practice should deal with the evolution or life of unilateral acts, with certain aspects, such as author, competence, form, content, and so on, given more detailed treatment, with a view to determining whether general rules or principles existed. The Commission would therefore welcome comments from States in that regard.

48. Turning to chapter IX of the report, he said that the Commission had adopted five draft guidelines on widening the scope of reservations and on modification and withdrawal of interpretative declarations. It had also considered the Special Rapporteur's ninth report (A/CN.4/544), dealing with the definition of objections, and had referred to the Drafting Committee draft guidelines 2.6.1 and 2.6.2.

49. Draft guideline 2.3.5 (Widening of the scope of a reservation) stated that the modification of an existing reservation for the purpose of widening its scope should be subject to the rules applicable to the late formulation of a reservation. If an objection was made to that modification, the initial reservation remained unchanged. Thus, if a State or an international organization wished to widen the scope of its reservation, the provisions applicable to late formulation must be applied in full and for the same reasons. Furthermore, in such a case it was essential to obtain the unanimous consent of the other parties to the widening of the scope of the reservation. No encouragement should be given to the late formulation of limitations on the application of a treaty. Depositaries treated "widening modifications" in the same way as late reservations.

50. Draft guideline 2.3.5 referred implicitly to draft guidelines 2.3.1, 2.3.2, and 2.3.3, but the transposition of the rules applicable to the late formulation of reservations to the widening of an existing reservation could not be unconditional. In the case of the late widening of the scope of a reservation, however, the reservation had already been established and produced the effects recognized by the Vienna Convention. The initial reservation thus remained unchanged in the event of an objection to the widening of its scope. The Commission had not considered it necessary to define

the "widening of the scope of a reservation" in a draft guideline because its meaning was obvious. However, a definition of that term had been included in the commentary.

51. Draft guideline 2.4.9 stated the principle that an interpretative declaration might be modified at any time unless the treaty provided that it might be made or modified only at specified times. Despite the paucity of examples in the practice, the draft guideline seemed to flow logically from the very definition of interpretative declarations.

52. Draft guideline 2.4.10 dealt with conditional interpretative declarations, the limitation and widening of the scope of which were governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations. Unlike the modification of simple interpretative declarations, the modification of conditional interpretative declarations was similar to a late formulation, which could be established only if it did not encounter the opposition of any one of the other parties. Although it might be difficult in some cases to determine whether the purpose of a modification was to limit or to widen the scope of a conditional interpretative declaration, the Commission had concluded that there was no reason to depart from the rules relating to the modification of reservations and that reference should therefore be made to the rules applicable respectively to the partial withdrawal and to the widening of the scope of reservations. In the latter case, the rules were the same as the ones contained in draft guideline 2.4.8 on the late formulation of a conditional interpretative declaration, which made the late formulation of such a declaration subject to the unanimous consent of all the parties.

53. Draft guideline 2.5.12 on withdrawal of interpretative declarations provided that, since an interpretative declaration could be formulated at any time, it could also be withdrawn at any time without any special procedure. The few cases in the practice confirmed that that was compatible with the very informal nature of interpretative declarations. Withdrawal must comply with the few formalities stated in draft guidelines 2.4.1 and 2.4.2.

54. Draft guideline 2.5.13 provided that the withdrawal of a conditional interpretative declaration was governed by the rules applicable to the withdrawal of reservations, which were contained in draft guidelines 2.5.1 to 2.5.9. The Commission would take a final decision on conditional interpretative declarations when it had concluded its consideration of the rules relating to both those declarations and reservations.

55. The Commission would welcome comments from Governments on the question raised in chapter III.F of its report, concerning the terminology to be used.

56. With regard to chapter X, "Fragmentation of international law", the Study Group on the topic had held useful substantive discussions on the function and scope of the *lex specialis* rule and the question of self-contained regimes. It had confirmed its wish to develop a substantive, collective document incorporating much of the substance of the individual studies produced by its members, as supplemented and modified by discussions within the Group.

57. In a thought-provoking study, the Chairman of the Study Group had, on the basis of doctrine and case law, considered the application of the *lex specialis* rule and the operation of self-contained regimes from a "systemic" perspective and concluded that general international law functioned behind all special rules and regimes. He had also suggested that there was an informal hierarchy between sources of international law. Within the systemic context, the *lex specialis maxim* constituted a technique of legal reasoning, whether as an interpretative device or a conflict-resolution technique. No strict rule for its use could be laid down; much depended on the context and the normative environment. It could constitute an application or elaboration of the general law or an exception to it, while in some cases it was prohibited. One aspect of the rule — relating to regional regimes and regionalism — would be separately treated in 2005. The Study Group had endorsed the systemic approach. In addition, it had been suggested that a distinction existed between the use of *lex specialis* in respect of derogation of the law and its use in respect of the development of the law, while the closeness of the two aspects highlighted its informal nature and dependence on context. Similarly, with regard to the related distinction between the permissibility of a derogation and the determination of the content of the derogating rule in a situation where derogation might be prohibited, *lex specialis* might still be applicable as a development of the relevant rule. Some members of the Study Group had doubted that there was any hierarchy, whether formal or informal, between the

sources of international law. The priority normally given to a treaty over a general custom was due to the wish to give effect to the will of the parties rather than some hierarchy in law. There had also been some disagreement regarding the study's treatment of the possibility of derogating from general law. Except in the case of *jus cogens*, it remained unclear in what other circumstances derogation was permissible or impermissible.

58. With regard to self-contained regimes, which the Chairman had suggested should appropriately be called "special" regimes, the Study Group had taken note of the terminological insecurity in case law and doctrine. It had been agreed that the notion of "self-containedness" was not intended to convey anything more than the idea of "the speciality" of the regime. Indeed, the term was regularly employed in several senses: sometimes narrowly, to denote a special set of secondary rules; sometimes broadly, to refer to a special set of rules and principles — either primary or secondary — on the administration of a particular question; or functionally, to cover whole fields of specialization. Special regimes, as understood in the functional sense, merited further study for a full understanding of their relationship both with the general law and with the other two senses in which the special regimes were understood. There had also been broad agreement that general law continued to operate in various ways, even within special regimes. The relationship between such a regime and the general law could not, however, be settled by any general rule. As for the question of falling back on to general law following the failure of a special regime, the Study Group had emphasized that the question of whether or not regime failure had occurred ought to be interpreted by reference to the treaties constituting the regime itself, and it had been recognized that no general laws could provide for such an eventuality. It had, however, been suggested that it would be useful to study further the different permutations in which such failure could occur. It had also been suggested that it was for the parties to a regime to decide whether it had failed and what the consequences should be.

59. The Study Group had also discussed outlines prepared in respect of the four remaining studies. Concerning the study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties), it had been acknowledged that most of article 30 did not pose dramatic problems of fragmentation. Only paragraph 4 (b) presented a situation in which an unresolved conflict of norms would arise. In that connection, it had been suggested that it might be useful to consider the treatment of the matter, and the choices made, by successive Special Rapporteurs on the law of treaties. The Study Group had endorsed the suggested focus on the question of whether limits could be imposed on the will of States that were parties to inconsistent treaties to choose which they would comply with and which they would have to breach. It had been suggested that article 41 of the Vienna Convention might provide some guidelines in the implementation of article 30.

60. With regard to the study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties), the Study Group had noted that the article reflected a need for parties to allow the implementation of a treaty to develop by *inter se* agreement, while the relationship between the original treaty and the *inter se* agreement could sometimes be seen as the relationship between a minimum standard and a further development thereof. It therefore did not ordinarily pose difficulties of fragmentation. The conditions of permissibility of *inter se* agreements reflected general principles of treaty law that sought to safeguard the integrity of the treaty. Such conditions did not always, however, relate to the nature of the original agreement. Under the terms of article 41, paragraph 1 (b) (ii), they also related to the nature of a provision. Moreover, the consequences of impermissible *inter se* agreements were not expressly dealt with in article 41. In the view of the Study Group, both aspects required further analysis.

61. It had also been suggested that the differences between the terms "modification", "amendment" and "revision" in the application of article 41 needed further attention in order to clarify their usage in practice. A review of the relationship between the different principles of coherence, including the relations between articles 30 (subsequent agreements) and 41 (*inter se* modification) of the Vienna Convention and Article 103 of the Charter of the United Nations (priority of Charter obligations) had also been suggested. In addition, the role that the "modification" of *inter se* agreements could play in reducing fragmentation should be explored.

62. With regard to the interpretation of treaties in the light of "any relevant rules of international law applicable in relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community, the Study Group had emphasized that article 31, paragraph 3 (c), applied only when there was a problem of interpretation. The provision related not only to other treaty rules but also to other sources of international law, such as customary law or the general principles recognized by civilized nations. The future study might therefore consider how customary law and other relevant rules were to be applied. Further attention should also be given to the relationship between article 31, paragraph 3 (c), and other rules of treaty interpretation, such as good faith or the object and purpose of a treaty under article 32. The existence of "mobile" concepts and the emergence of standards generally accepted by the international community should likewise be taken into account. The question had also arisen as to whether the way inter-temporal law had been seen at the time of the adoption of the Vienna Convention in 1969 remained valid, in view of the many transformations in the international system since that time.

63. With regard to the outline on hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules, the Study Group had emphasized that the study should be practice-oriented and should refrain from identifying general or absolute hierarchies. The reference to "conflict rules" was intended to be understood as meaning that hierarchy should be treated as an aspect of legal reasoning within which it was common to use such techniques to set aside less important norms by reference to more important ones. The Group endorsed the suggested focus on the possible conflicts between the three hierarchical techniques and on any conflicts within each category. It would also be useful to analyse the differences between jus cogens and erga omnes obligations: the latter might not involve hierarchical relationships in the same way as the former. The use of a hierarchical relationship — whether, for example, State responsibility was attributable when an inferior rule was set aside by a superior one — should also be considered. Above all, examples of the use of hierarchical relationships in practice and doctrine in order to solve normative conflicts should be provided.

64. The Study Group had sought to stress the unity of the international legal system as well as accentuating the importance of general international law. Thus, while hierarchy might sometimes bring about fragmentation, in most situations it was used to ensure the unity of the international legal system as a whole.

65. **The Chairman** expressed the hope that the Commission's deliberations on various theoretical points of international law would shortly bear fruit in the form of guidelines on reservations to treaties and unilateral acts of States, together with practical recommendations on aspects of the fragmentation of international law.

66. **Ms. Schlegel** (Germany), referring to chapter VIII of the report, said that her delegation would submit detailed comments on the topic "unilateral acts of States" in writing. Meanwhile, she noted that given the great variety of unilateral acts, the complexity of the topic made the Commission's task of defining and formulating clear guidelines very difficult. It was essential to draw a distinction between unilateral acts that constituted an expression of will or consent and those that had a legal effect. The Special Rapporteur's division of unilateral acts into three categories — promise and recognition; waiver; and protest — should help to increase legal certainty. The Commission should, however, develop a clear definition of unilateral acts of States having a legal effect, while at the same time ensuring that States enjoyed sufficient flexibility for acts of a political nature.

67. In order that unilateral acts and their legal consequences could be comprehensively categorized, a further study of State practice and a clear-cut distinction between the various forms of unilateral acts of States were needed. To that end, States would need to provide further information. As well as making a synthesis of all the studies submitted, the Special Rapporteur should also aim to retain the flexibility that was central to the attractiveness of unilateral acts as a means of State conduct. Since general rules could hamper that flexibility, one way of maintaining the balance between legal certainty and flexibility would be to elaborate general rules applying only to specific forms of unilateral acts, such as acts of recognition.

68. With regard to chapter IX, her delegation attached great importance to the Commission's work on reservations to treaties. The central question for her delegation, when assessing reservations, was whether it

should respond with an objection, most crucially in the case of reservations made contrary to the exceptions laid down in article 19 (a), (b) and (c) of the Vienna Convention on the Law of Treaties. Of particular interest were cases where a reservation was, in the judgement of another State party, incompatible with the object and purpose of the treaty concerned. Did such reservations have legal effect? And must or should an objection be made to them? The question was left open in the Vienna Convention and the Special Rapporteur therefore planned to focus on the question of how to characterize a reservation that was not permitted under article 19 of the Convention. The Commission had addressed the issue in another context, namely in the discussion of draft guideline 2.1.8 [2.1.7 bis] "Procedure in case of manifestly [impermissible] reservations", in which it had not been possible to agree on the word "impermissible", with the result that the words "inadmissible" and "invalid" had been proposed as alternatives. The terminological question should also be seen in relation to the various schools of thought on the legal consequences of such reservations. Although they were invalid under international law, thus requiring no objection, experience showed that hardly any State refrained from an objection on those grounds. Germany, in objecting to reservations it considered incompatible with the object and purpose of a treaty, did so in order to indicate criticism to the reserving State, which might thus be encouraged to withdraw its reservation. The terms "valid" or "invalid" should therefore not be used to qualify such reservations, since they seemed akin to the term "nullity" and would thus not have the desired effect of encouraging objections. As for the choice between the words "impermissible" and "inadmissible", she noted that, in the formulation of objections, the following form of wording seemed to have evolved: "according to established customary law, reservations incompatible with the object and purpose of a treaty shall not be permitted". The related terms "permissibility" and "permissible/impermissible", which seemed to enjoy broad acceptance, indicated an objective yardstick and should therefore be adopted. Her delegation's suggestion for the corresponding French term was the word "*illicite*".

69. In reference to chapter X, she observed that States were progressively more willing to subject their bilateral and multilateral relations to an international legal framework. That development had, on the one hand, strengthened international law; on the other hand, it had contributed to the increasing number of conflicting norms and legal regimes. To ensure stability and legal certainty in international relations, States needed practical guidelines on how to deal with the conflicts caused by fragmentation. Her delegation appreciated the efforts by the Study Group on the topic to move in that direction, beginning with a substantive study covering such norms as the relevant date when applying the *lex posteriori* rule, where the question was whether the applicable date was the date of ratification or the date on which a treaty came into force, since the period of time between the two might vary from one treaty to the next. Lastly, her delegation welcomed the fact that the Chairman of the Study Group was to prepare a supplementary report on the progressive regionalization of international law, since that had been the subject of its comments on the Commission's first report on fragmentation of international law.

70. *Mr. Simon (Hungary), Vice-Chairman, took the Chair.*

71. **Mr. Guan Jian** (China), referring to chapter VIII of the report, noted that the seventh report of the Special Rapporteur on unilateral acts of States (A/CN.4/542, Corr.2 and Corr.3) enumerated many facts without properly taking up the questions asked in recommendation 6 put forward during the fifty-fifth session of the Commission, namely, the reasons for the unilateral act of the State, the criteria for the validity of the commitment of the State and the conditions under which a unilateral commitment could be modified or withdrawn. His delegation endorsed the Commission's decision to establish an open-ended Working Group on Unilateral Acts of States to study selected cases, and supported continued work on the topic in accordance with the recommendations adopted at the Commission's fifty-fifth session.

72. On the question of whether political unilateral acts should be covered under the topic, his delegation felt that there was no clear demarcation between legal acts and political acts; for some political acts could also be legal acts and produce legal consequences. In order to prevent unauthorized unilateral acts of States, there should be some restrictions on who could perform unilateral acts on behalf of States. On procedural issues, such as the interpretation, modification, suspension or termination of unilateral acts, provisions could be modelled on those in the Vienna Convention on the Law of Treaties. In the Special Rapporteur's report, some examples of

unilateral acts had incorrectly been cited as acts of States, when the actor was a non-State entity. As a body established by the General Assembly, the International Law Commission was obligated to respect the relevant United Nations resolutions. Such mistakes should be avoided in future reports.

73. Turning to chapter IX of the report, he noted that in the view of the Special Rapporteur on reservations to treaties, the definition of objections to reservations should not prejudge the legal effects of the objections. Although no conclusion had been reached as to the validity of objections which did not have effects provided for in article 21 of the Vienna Convention on the Law of Treaties, such objections were nevertheless objections to reservations and should therefore be reflected in the definition. Article 19 of the Vienna Convention specified the circumstances in which a State could formulate reservations but did not state the legal consequences of violating the article. Although the responsibility a State might incur by formulating a reservation in violation of article 19 was unclear, in the view of his delegation it was unacceptable for a State objecting to a reservation to unilaterally claim the full applicability of a treaty between it and the reserving State. In determining what treaty relationship, if any, would exist between the reserving State and the objecting State, the intention of both parties should be taken into account.

74. **Mr. McRae** (Canada), referring to chapter X of the report, said that the work of the Commission's Study Group on Fragmentation of International Law, in particular the study on *lex specialis* and self-contained regimes, highlighted the difficulties and complexities of the topic. While the *lex specialis* rule appeared to be functioning effectively as an interpretative device and a rule of conflict resolution, it was in the area of self-contained regimes that the potential for fragmentation was most acute. The Study Group had identified three senses of the term "self-contained" regimes, one of which concerned areas of functional specialization, such as human rights law, World Trade Organization law ("WTO law") and humanitarian law. His delegation felt that the latter category needed to be further refined. Some areas of functional specialization, human rights law, for example, or the law of the sea, were only loosely self-contained. Although they had their own principles, institutions and teleology, those principles and rules were widely referred to and applied in different forums. In contrast, more "closed" self-contained regimes, such as WTO law, sought to maintain a monopoly over the interpretation and application of their law and purported to exclude recourse to other forums. International criminal law might over time become more self-contained in that sense. While it was true that general international law provided a normative background for WTO law, it was not clear how it would operate within that self-contained system. Difficult questions had arisen about whether the principles of general international law could supplement or modify the obligations set out in the WTO agreements.

75. The situation was more complex when the rules of the self-contained regime had developed sui generis and not from a broad international law base. Human rights law was grounded in a public international law tradition, and the links between general international law and human rights law were many. WTO law, on the other hand, had developed from a treaty regime that had operated generally in isolation from public international law, and some of its practitioners had denied any link at all. Canada did not wish to suggest that there was a crisis. Rather it raised the issues to suggest a fruitful avenue for deeper enquiry by the Study Group and the Commission, and it encouraged them to continue their work on a topic of increasing importance.

76. With regard to chapter VIII, on unilateral acts, Canada congratulated the Special Rapporteur on the compilation of a large body of material on State practice. Some important definitional and categorization tasks lay ahead. His delegation wondered whether the working definition of a unilateral act of a State as a statement expressing the will or consent by which a State purports to create obligations or other legal effects under international law was an adequate reflection of the practice compiled by the Special Rapporteur. It also had doubts whether the concept of "promise" was a useful category for some of the examples identified. For example, a statement that a Government intended to lower tariffs on goods from certain countries was a statement of intent but was hardly likely to be promissory. The recognition that different legal systems viewed the concept of a promise differently only reinforced the need for clearer definitions.

77. Although some members of the Commission felt that it was necessary to distinguish between legal and

political acts, there were many instances in which the categories would overlap. In interests of clarity, distinctions should be made between acts in terms of their legal consequences. One possible breakdown might distinguish acts that contributed to the development of customary rules of international law; acts that created other specific legal obligations; and acts that had other effects under international law. Inevitably there would be some overlaps, but the process of assigning unilateral acts to those categories would provide a better understanding of their nature and import. A typology of that kind would better enable the Special Rapporteur to separate relevant unilateral acts from those that were irrelevant for purposes of the study and to determine where the focus should lie. In the meantime, Canada shared the view that the topic was not yet ready for the formulation of draft articles.

78. **Mr. Bühler** (Austria), referring to chapter VIII of the report, said that in the seventh report of the Special Rapporteur on unilateral acts of States (A/CN.4/542, Corr.2 and Corr.3) a number of the instances of State practice cited involving Austria were misleading. Paragraph 46 of the report, in relation to recognition of States, referred to Austria's recognition of a diplomat as the Palestine Liberation Organization's official representative in Austria. It should be noted that Austria had at that time recognized the Palestine Liberation Organization as a representative of the Palestinian people but not as a State; a clear distinction should be made between recognition of an organization's official representative and recognition of a State. In paragraph 112 it was erroneously assumed that in 1999 Austria had closed its airspace to military flights by the North Atlantic Treaty Organization (NATO) as a protest against NATO attacks carried out on Yugoslavia, whereas it had done so because of its neutral status. Paragraph 177 of the report discussed the notification of Austria's neutrality to other States. In Austria's view, a State that unilaterally notified its neutrality retained full control to alter or abandon it. The purpose of the related footnote 295 was unclear, since it quoted a merely political statement by the President of the Russian Federation. With regard to paragraph 234 of the Commission's report concerning solemn declarations, Austria had concluded that the negative security guarantees delivered by major Powers during the special session of the General Assembly in 1978 had had binding effect.

79. Concerning chapter IX, on reservations to treaties, his delegation would like to reaffirm its position regarding the late formulation of a reservation and the widening of the scope of a reservation. It was irreconcilable with the basic principle *pacta sunt servanda* that a State could at any time unilaterally reduce the scope of its obligations under a treaty by means of a reservation. The work on reservations had arrived at a decisive point with the question of reservations incompatible with article 19 of the Vienna Convention on the Law of Treaties. Austria's position had always been consistent in that regard and was based on the considerations that there must be limits to unilateral definitions of the obligations resulting from a treaty; that a State by becoming a party to a treaty was bound to abide by the core obligations of the treaty, reflecting its object and purpose; that the *favor contractus* principle required that any declaration incompatible with the treaty must be regarded as invalid; and that a State making an impermissible reservation should not be allowed to benefit from a breach of article 19 of the Vienna Convention. If States were allowed to make any reservation they wished to a treaty under pretext of sovereignty, they could divest it of any substance, and it would be very difficult to identify the rights and obligations between two States parties resulting from a multilateral treaty.

80. The only remedy of a State party to an impermissible reservation would consist of a qualified objection to the reservation precluding the entry into force of the treaty as between the objecting State and the reserving State. However, that solution would work only for synallagmatic treaties and not for treaties establishing *erga omnes* obligations; in the case of human rights or similar treaties, it would create undesirable results. If an objecting State refused to enter into a treaty relationship with a reserving State, it would not prevent the reserving State from becoming a party to the treaty and benefiting from its reservation. It would only have the effect of making it impossible for the objecting State to invoke the responsibility of the reserving State for breaches of the treaty, so that it might for that reason decide to refrain from objecting. As a result, any State would be in position to formulate a reservation incompatible with the object and purpose of the treaty without risking an objection, and article 19 of the Vienna Convention would become devoid of substance.

81. Recent practice had shown that it was not always possible to determine from the outset whether a reservation was incompatible with the object and purpose of a treaty. In such cases, States parties should enter into a dialogue with the reserving State in order to clarify the scope of the reservations. In a case of recent practice with regard to the Rome Statute of the International Criminal Court, article 120 of which explicitly excluded reservations, a number of States had made interpretative declarations, at least one of which was considered by several States parties as amounting to a reservation. Their reactions had differed, but none of them had refused to enter into a treaty relationship with the declaring State. The case showed yet again that the only possible reaction to inadmissible reservations was to regard them as illegal and null and void.

82. With regard to chapter X, on the fragmentation of international law, the Commission's current report demonstrated the need to address the topic. The issues of self-contained regimes, the *lex specialis* rule, relevant rules of international law applicable in relations between the parties and hierarchy in international law all raised a number of still unresolved problems calling for further clarification. Austria shared the view that the term "self-contained regime" was somewhat of a misnomer, if it was taken to mean that a special regime was totally isolated from general international law. His delegation supported the proposed direction of work on the topic.

Agenda item 140: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts (*continued*) (A/C.6/59/L.13)

83. **Mr. Awanbor** (Nigeria) said that his delegation wished to become a sponsor of draft resolution A/C.6/59/L.13.

84. **The Chairman** said he took it that the Committee wished to adopt draft resolution A/C.6/59/L.13 without a vote.

85. *Draft resolution A/C.6/59/L.13 was adopted.*

The meeting rose at 12.35 a.m.

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Held at Headquarters, New York, on Monday, 8 November 2004, at 2.30 p.m.

Chairman: Mr. Simon (Vice-Chairman) ..... (Hungary)

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In the absence of Mr. Bennouna (Morocco), Mr. Simon (Hungary), Vice-Chairman, took the Chair.

The meeting was called to order at 2.40 p.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Ms. Galvão Teles** (Portugal) said that her delegation agreed in general with the way that the International Law Commission was proceeding with its study of unilateral acts of States (A/59/10, chap. VIII) and trusted that the results would soon be ready for presentation.

2. With regard to reservations to treaties (A/59/10, chap. IX), her delegation would wait until a complete set of guidelines was ready for consideration before commenting at length. However, it held that the Commission should work on State practice, rather than try to codify a definition of "objections to reservations", as that was already provided for in the Vienna Convention on the Law of Treaties, of 1969. There was also concern as to whether it was worthwhile to qualify the reservations according to validity or invalidity. The Vienna Convention was also sufficient in that respect, and emphasis should instead be placed on the scope of effects of a reservation.

3. With respect to the fragmentation of international law (A/59/10, chap. X), her delegation shared the view that the Commission should not be limited to drafting conventions for the approval of States, but should also explore working methods that would advance the development of international law. Portugal looked forward to the opportunity for States to participate in discussions on that question, either in the Committee or in a panel or seminar, and would gladly cooperate in the organization of such an event.

4. With regard to new topics for inclusion in the Commission's current and long-term work programmes (A/59/10, chap. XI), the question of whether and under what conditions the international community and States had a responsibility to protect in cases of massive violations of human rights would be an appropriate item to add to the agenda.

5. Lastly, her delegation wished to see greater interaction between the Commission and the Committee, including the provision of verbatim records of statements in electronic format in the place of summary records.

6. **Mr. Rosand** (United States of America) said that his delegation recognized the particular challenges raised by the topic of unilateral acts of States, including disagreements among members of the Commission, which had slowed progress on the topic. While welcoming the decision to entrust a working group with the task of determining whether such acts had common characteristics or criteria, his delegation questioned the suitability of the topic for codification or progressive development.

7. With respect to the topic of reservations to treaties, his delegation was comfortable with the use of the concept of "validity", which was used in articles of the Vienna Convention on the Law of Treaties other than article 19. It did not appear to give rise to the disadvantages described in paragraph 35 of the Commission's report for other suggested terminology. "Validity" thus appeared to be the most appropriate way of addressing the issue.

8. With respect to the topic of fragmentation of international law, the work of the Study Group on the function and scope of *lex specialis* and the question of "self-contained regimes" appeared to be very interesting. However, fragmentation was a particularly broad and theoretical topic which, while interesting, did not lend itself to the development of draft articles or draft guidelines. A more useful product might be an expository study to provide information on possible approaches to the issues.

9. **Ms. Telalian** (Greece) noted that the Special Rapporteur, in his ninth report on reservations to treaties (A/CN.4/544), proposed new wording for the definition of the term "objection", to the effect that an objection purported "to modify the effects expected of the reservation". Since the proposed wording appeared to be based on a single example derived from actual practice, her delegation would find it hard to accept that it reflected a general rule on objections to reservations unless more practice were provided to defend that position. It would be more appropriate to retain the alternative definition proposed by the Special Rapporteur in his eighth report (A/CN.4/535) and revise it later, as necessary.

10. The definition of the term "objection" should be drafted in a general manner, so as to cover a broad range of cases corresponding to actual and well developed practice. It would then be difficult to exclude from the scope of such a definition the intention of objecting States to consider the treaty binding in its entirety on the reserving State. That was the case with regard to objections against reservations incompatible with the object and purpose of a treaty, as set forth in article 19 of the Vienna Convention on the Law of Treaties. Such reservations were impermissible; they not only downgraded the normative provisions of such treaties and undermined their integrity, but also contravened the interest of the other States parties in preserving that integrity. Her delegation would prefer the term "impermissible" to qualify that category of reservations.

11. The Commission should focus its work on a thorough examination of those issues, as well as on whether the rules of the Vienna Convention concerning acceptances of and objections to reservations should also apply in the case of impermissible reservations (arts. 20-21 of the Convention). Only signatory States should be entitled to formulate an objection, since that possibility was closely linked to the obligation of signatory States not to defeat the purpose and object of the treaty before becoming parties to it. The objecting State should repeat its objection at the time of ratification.

12. **Mr. Makarowski** (Sweden), speaking also on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), invited delegations to review the working paper entitled "Reservations to human rights treaties" (E/CN.4/Sub.2/2004/42) and the Special Rapporteur's comments thereon. He also urged the Special Rapporteur to accord priority to the issue of reservations incompatible with the object and purpose of a treaty, a matter of special concern to the Nordic countries.

13. The delegations on whose behalf he spoke strongly supported widening the definition of the term "objection" to include the "super maximum effect", as reflected in paragraph 293 (e) of the Commission's report. They suggested, however, that some flexibility should be built into the definition, in accordance with article 21, paragraph 3, of the Vienna Convention on the Law of Treaties. Furthermore, they held that the word "modify" should be excluded from the definition, as it might introduce a new element. Objections by a State only to parts of a reservation should also be covered, and therefore "modify" should be replaced by "all or some of".

14. The Commission might wish to consider the term "impermissible reservations" in the light of article 19, paragraphs (a), (b) and (c), of the Vienna Convention on the Law of Treaties, and the term "invalid reservations" in the light of article 19, paragraph (c), of that Convention.

15. **Ms. Collet** (France) said that while it might appear redundant, draft guideline 2.6.2 (A/CN.4/544, para. 29) was undeniably useful because it cleared up the potential ambiguity of the term "objection" as used in the Guide to Practice, to mean either an objection to the late formulation or widening of the scope of a reservation or an objection to the reservation itself.

16. Her delegation was more concerned about the definition of objections to reservations set out in draft guideline 2.6.1 (ibid., para. 2). The Commission appeared to be seeking to broaden the definition provided in the Vienna Conventions on the Law of Treaties. The expression "purports to exclude or modify the effects of the reservation in relations between the author of the reservation and the author of the objection" appeared to be particularly ambiguous, and the arguments advanced in its favour were not convincing. According to the Commission, the proposed definition would not prejudge the validity or invalidity of the objection; like the definition of reservations, it was neutral. However, a reservation always had the same effect; as set out in draft guideline 1.1.1, it purported to exclude or modify the legal effect of certain provisions of a treaty. The incompatibility of a reservation with the object and purpose of the treaty stemmed not only from the effect of the reservation but also from the provision(s) to which it related. In the case of an objection, the very effect it sought to engender might render it invalid. Furthermore, the alleged invalidity of a reservation might be challenged by an objection, while the possibility of reacting to an objection, the effects of which might be considered as exceeding the right to object, appeared doubtful. The proposed definition could therefore not be construed as neutral. Only a strict definition of an objection, specifying exactly its effects, would remove all ambiguity with regard to the admissibility of an objection which might have other effects.

17. With regard to so-called objections with super maximum effect, whereby the State author of the objection sought to paralyse the effects of a reservation, the Special Rapporteur had recognized that such an objection would exceed the limits of the

consensual framework underlying the Vienna Conventions. Recognition of the super maximum effect would inevitably discourage States from participating in some of the most important agreements and treaties. In the view of her delegation, therefore, it was preferable not to suggest in the definition that an objection could have such an effect; however, the phrase "exclude or modify the effects of the reservation" allowed for that possibility.

18. A compromise between too broad or too narrow a definition might be one that defined an objection as a reaction purporting to make the effects of the reservation non-opposable in relations between the State author of the objection and the State author of the reservation. Such a definition would be flexible enough to meet the requirements of an "objection with intermediate effect". While not preventing the entry into force of the treaty between the parties, such an objection would render inapplicable between them not only the provision covered by the reservation but other treaty provisions as well. Such an effect would be within the maximum effect permissible under the Vienna Conventions and therefore appeared to raise no difficulties. A State might consider that the reservation affected other treaty provisions and accordingly, decide not to be bound by those other provisions. It was important to distinguish between "validity" and "opposability". In international law, a State's assessment of validity was subjective, and therefore the same reservation might be considered valid by some States and invalid by others. Nullity, which was the penalty for invalidity in domestic law, did not appear to be an appropriate outcome of the invalidity of a reservation in international law.

19. "Opposability", or more precisely "non-opposability", made for a more precise characterization of the penalty for such invalidity, as subjectively assessed. A State which deemed a reservation to be invalid could declare its effects non-opposable to that State. The terms "lawfulness" and "unlawfulness" should be avoided in any case.

20. **Ms. Escobar Hernández** (Spain) said that draft guideline 2.6.1 contained a valid concept of objections. Nevertheless, the central question of the effects of reservations in relation to objections remained unresolved. It was not possible to establish a complete analogy between the nature of reservations and that of objections, and the so-called "intermediate effect" therefore raised doubts, as it might leave a treaty permanently open, a result that would be hard to reconcile with the Vienna Conventions.

21. Furthermore, while it was preferable to exclude from the draft guidelines any element that might cause confusion with regard to the possibility of formulating extemporaneous reservations, such a risk was reduced by the unanimity reflected in draft guidelines 2.3.5, 2.4.9 and 2.4.10. Lastly, her delegation objected to the use of the term "admissible" and "opposable" to describe reservations that could not be formulated in accordance with article 19 of the 1969 Vienna Convention, because they had many different meanings in Spanish. On the other hand, "valid" was the most suitable term for describing the different categories of reservations permitted under the Vienna Conventions.

22. With regard to the topic of unilateral acts of States, her delegation found the proposals of the Working Group interesting and awaited the results of its review of practice and methodology.

23. **Mr. Makarewicz** (Poland) said that the draft guidelines on reservations to treaties provisionally adopted by the Commission during its recent session did not raise any major concerns and were generally acceptable. However, with respect to draft guideline 2.6.1 (Definition of objections to reservations), he noted that the most frequent objection, the minimum effect objection, might not be covered by the definition given in the ninth report of the Special Rapporteur (A/CN.4/544) because, in practice, the effects of a minimum effect objection were the same as the effects expected of the reservation. His delegation therefore suggested that the word "legal" should be added before the word "effects" in draft guideline 2.6.1. It also suggested that the words "even if, in a particular case, the ultimate effects of this statement are those of the reservation" should be added at the end of the draft guideline. Alternatively, the following definition of objections to reservations might be considered:

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby the State or organization purports to express an act of non-acceptance (or rejection) of the reservation, certain legal effects being attributable to this act".

In order to address concerns about the increasing number of draft guidelines, certain additional elements should be included in draft guideline 2.6.1, rather than

formulating them in separate guidelines, as suggested by the Special Rapporteur.

24. With regard to the question of validity of reservations raised by the Commission in chapter III of its report (A/59/10), his delegation agreed that the use of terms such as "validity"' and "lawfulness" in the context of article 19 of the Vienna Convention did have certain disadvantages. Poland therefore suggested the use of the term(s) "effectiveness" or "legal effectiveness" of reservations in that context. Ineffective reservations were excluded from the ordinary procedure concerning reservations to treaties.

25. While supporting the inclusion of the topic "Fragmentation of international law" in the Commission's current programme of work, his delegation urged the Commission to proceed with caution. While fragmentation was a natural consequence of the expansion of international law, it might result in conflicting jurisprudence. Accordingly, a series of studies on issues identified by the Commission and fully reflected in a final document might have considerable theoretical and practical significance.

26. **Mr. Lavalle** (Guatemala), referring to the draft guidelines on reservations to treaties provisionally adopted by the Commission, said that the second sentence of guideline 2.3.5 might be better rendered as follows: "However, an objection to such modification shall in no way affect the effects of the initial reservation". The proposed wording took into account the likelihood that the initial reservation did not have the same effect for all States parties to the treaty in question, and that some of those States might avail themselves of the possibility afforded by article 20, paragraph 4 (b), of the Vienna Convention on the Law of Treaties to preclude the treaty's entry into force between themselves and the reserving State.

27. With regard to draft guideline 2.5.12, his delegation foresaw a problem deriving from the reference to "the same procedure applicable to its formulation". The problem was related not to the formulation of the withdrawal but to its communication. The modalities for communicating a withdrawal were set out in the draft article, but the draft did not include a comparable provision on interpretative declarations, which might logically be called "Communication of interpretative declarations". It would seem appropriate to add a draft guideline with that title, whose text would be the same, mutatis mutandis, as the text of draft guideline 2.1.5. However, the matter was complicated by the existence not only of conditional interpretative declarations but also of simple interpretative declarations. Since a conditional interpretative declaration had the same effect as a reservation, it was quite natural that the draft articles should accord it the same treatment as a reservation.

28. The same could not be said, however, of a simple interpretative declaration, which could certainly produce legal effects, but only through estoppel. Since estoppel was entirely alien to the law of treaties, there was no justification for including simple interpretative declarations in the framework of the draft articles on reservations to treaties. It might be argued that their inclusion could do no harm; however, while the rule established in draft guideline 2.4.1 was justified in the case of conditional interpretative declarations, the same could not be said of simple interpretative declarations. He wondered, therefore, whether it would not be best to amend draft guideline 2.4.1 so that it applied only to conditional interpretative declarations, and to include in the draft article a guideline identical to draft guideline 2.1.5, except that it would apply only to conditional interpretative declarations.

29. His delegation was gravely concerned at the status of the work on the topic of unilateral actions of States (A/59/10, chap. VIII). It shared the opinion of the Working Group on the topic, as set out in paragraph 305 of the Commission's 2003 report (A/58/10), which appeared to imply that the work had become bogged down. There seemed to be no reason to take a less pessimistic view during the current session. It was a matter of particular concern that some members of the Commission and some States considered that the issue could not be addressed by a set of draft articles. Particularly significant in that regard was the opinion expressed by the United Kingdom in document A/CN.4/524. His delegation believed that it was not impossible to reach agreement on a set of draft articles, provided that the Commission began by agreeing on a specific definition of the acts to be regulated, as suggested by the Special Rapporteur in his first report. The resulting draft article would be based on article 3 of the Vienna Convention on the Law of Treaties, and would provide that the inapplicability of the draft to other unilateral acts or conduct of States would affect neither the validity of those acts nor the application to them of the rules contained in the draft articles.

30. **Mr. Romeiro** (Brazil), stressing the importance of the Commission's work on unilateral acts of States, said that it was necessary to identify general rules applicable to all unilateral acts in order to promote the stability and predictability of relations between States. Because it was important to define the scope of unilateral acts as precisely as possible, his delegation favoured a clear, precise determination as to which authorities could effectively engage the State's responsibility. His delegation supported the decision to draw up a general list of qualifying acts, but felt that specific rules should be adopted concerning legal effects.

31. With respect to the subject of reservations to treaties (A/59/10, chap. IX), Brazil welcomed the intention of the Special Rapporteur to address the question of the admissibility of reservations in his next report. The terminology to be used should reflect the concern that a reservation should not prejudice the integrity and spirit of the instrument in question. States parties must be the ultimate judges of the admissibility of a given reservation.

32. The fragmentation of international law (A/59/10, chap. X) was a relevant topic in view of the recent proliferation of new international norms, regimes and institutions. Brazil welcomed the Study Group's consideration of the preliminary report on related issues, including the function and scope of the *lex specialis* rule and the question of self-contained regimes, the modification of multilateral treaties between certain of the parties only, and the study on hierarchy in international law. The approach to those topics would help to identify existing structures and procedures for dealing with conflicts of norms and the issue of how they might be adapted to fill the existing void in the hierarchy of international norms.

33. **Mr. Braguglia** (Italy) said that the focus on practice in the seventh report of the Special Rapporteur on unilateral acts of States (A/CN.4/542) represented a positive development. The Commission should analyse those events from which useful consideration could be drawn and which could, in turn, be presented in the form of draft articles or in some other form.

34. With respect to the subject of reservations to treaties, his delegation urged the Commission to address the most important aspect of the question, namely, the definition of reservations that were impermissible and objections to such reservations. The Vienna Convention did not regulate the question clearly. To state that a reservation was impermissible or invalid, or even inadmissible, reflected the notion that it was not a reservation that the State party was entitled to make. However, a reservation that was not considered permissible by one State party might be deemed so by another State party, and should therefore be deemed permissible with respect to the latter. The expression "unlawful reservation" would be more appropriate when drawing a distinction between States, although it did have the disadvantage of suggesting that the State making the reservation would be responsible under international law, as a result, and that was clearly not the case. The Commission had not yet concluded its discussion of the draft guideline concerning the definition of objections to reservations. His delegation reiterated its wish that the Commission should adopt a broad definition, which would facilitate the inclusion of all criticisms that a State might make of a reservation.

35. With regard to the fragmentation of international law, his delegation welcomed the progress made by the Study Group. The analysis of *lex specialis* and of "self-contained regimes" seemed important, not just from the theoretical point of view, but also in order to clarify certain practical questions. However, some aspects of the analysis might benefit from more in-depth consideration, notably the hypothesis concerning the failure of such regimes. In pursuing its analysis of fragmentation, the Commission should recall that the benefits of its analysis should be easily accessible to States, and that it should begin by submitting certain specific proposals that might offer practical guidance.

36. **Mr. Dolatyar** (Islamic Republic of Iran), speaking on the topic of reservations to treaties, agreed with the Special Rapporteur that a definition of objections should precede consideration of their legal effects. The term "objection" should be defined in the light of established principles of international law, including the principle of State sovereignty; that principle, which was the basis of the Vienna Conventions, ensured that no State could bind another to a treaty obligation against its will. Thus, objections with super maximum effect had no place in international law because they would constitute the imposition of treaty obligations on a State without its prior consent.

37. Only parties to a treaty were entitled to formulate objections to that treaty because reservations and

objections thereto created bilateral legal relations between the reserving State and the objecting State, an argument based on the principle that there should be a balance between the rights and obligations of the parties. Furthermore, signatories should not have the right to object to reservations in situations where their overall obligation towards the parties was limited to refraining from acts which would defeat the object and purpose of the treaty; at most, they might be entitled to object to reservations which they considered to be contrary to that object and purpose.

38. **Ms. McIver** (New Zealand) reiterated her delegation's view that a study of the fragmentation of international law was timely and that the Commission was the ideal body to conduct such a study. She welcomed the Commission's decision not to focus on the final form of its work; the exercise would be useful whether or not it gave rise to normative results, as seen from the study on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" and from the outlines prepared on other subjects. However, she was pleased that the Commission's Study Group had taken note of the Committee's interest in a result that would have practical value and that it planned to produce a concise summary of its larger substantive work; such a summary would be a valuable day-to-day resource document for dealing with international legal issues.

39. The conclusion that general international law functioned in an omnipresent manner behind special rules and regimes, that no special rules could be isolated from general international law and that the term "self-contained regime" was a misnomer was significant, because it established that the emergence of special treaty regimes in such areas as trade, human rights and the environment did not mean that the international legal regime was losing coherence and was in crisis. It also suggested techniques for dealing with the existence of apparently conflicting rules in a given situation and emphasized the importance of the rules contained in the Vienna Convention on the Law of Treaties for reconciling conflicting norms. Treaties were themselves a product of international law; they derived their legitimacy from an international legal system and must be interpreted against that background.

40. **Mr. Pandit** (Nepal) referred to the draft articles on diplomatic protection adopted by the Commission on first reading (A/59/10, chap. IV). Draft article 2 affirmed the discretionary right (but not the obligation) of the State to exercise diplomatic protection on behalf of its nationals, while draft article 3 emphasized that the State entitled to exercise diplomatic protection was the State of nationality. Two exceptions to the nationality principle were provided for in draft article 8, namely, in the cases of refugees and stateless persons. There was a close relationship between the draft articles on State responsibility and those on diplomatic protection.

41. Draft article 9 extended diplomatic protection to corporations provided that certain conditions were met. A corporation must be a profit-making enterprise with limited liability whose capital was represented by shares. In accordance with the *Barcelona Traction* case, international law attributed the right of diplomatic protection of a corporation to the State under the laws of which it was incorporated and in whose territory it had its registered office. However, the draft article did not deal with a corporation that had the nationality of more than one State.

42. As to the protection of shareholders, it seemed that the Commission had developed draft articles along the lines of the *Barcelona Traction* case.

43. Part Three of the draft articles dealt with the exhaustion of local remedies rule. The Commission had replaced the existing reference, in article 14, paragraph 2, to remedies "as of right" with "legal remedies". His delegation was of the view that draft article 14 was in line with the customary rule of international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. The International Court of Justice had recognized that rule in the *Interhandel* case.

44. His delegation welcomed the Commission's proposal to discuss the clean hands doctrine in relation to the topic of diplomatic protection at its next session.

45. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/59/10, chap. VII) provided a sound basis for the Commission's future work on the topic. The legal regime contemplated by the draft principles should take into account economic development and potential benefits to society, without prejudice to the rules relating to State responsibility.

46. During its second reading, the Commission should consider the feasibility of combining the draft

articles on the prevention of transboundary harm from hazardous activities and the draft principles on allocation of loss into a single draft instrument, the final form of which could be determined on the basis of the integrated text.

47. His delegation supported the view that the question of the responsibility of organizations established under municipal law and non-governmental organizations should be excluded from the study on responsibility of international organizations (A/59/10, chap. V). With respect to the issues on which the Commission had sought the views of governments (A/59/10, para. 25), Nepal believed that a compilation of the practices of international organizations would be helpful.

48. The topic of shared natural resources (A/59/10, chap. VI) should include matters relating to groundwater, oil and gas. The Commission's work on that topic would both codify international rules and help alleviate the suffering of millions of people with water-borne diseases in developing countries. Studies should be conducted on State practice with respect to use and management, including pollution prevention; cases of conflict; and domestic and international rules concerning groundwater.

49. He commended the Commission for its decision to conduct studies on the topic of the fragmentation of international law (A/59/10, chap. X). His delegation also believed that the new topics, "Effects of armed conflicts on treaties", "Expulsion of aliens" and "The obligation to extradite or prosecute", would promote the development of a legal framework for international cooperation in addressing the contemporary problems that States faced in those areas.

50. His delegation attached importance to the International Law Seminar; he thanked donor countries for their financial contributions and urged them to continue their support for the Seminar.

51. Lastly, Member States should revisit the question of honoraria and ensure that the work of the Special Rapporteurs, in particular those from developing countries, was not adversely affected by budget cuts. The Commission should also endeavour to make technical assistance available to developing countries so that they could improve their capacity to submit information in response to the Commission's queries and annual reports.

Agenda item 147: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/59/L.17 and L.18)

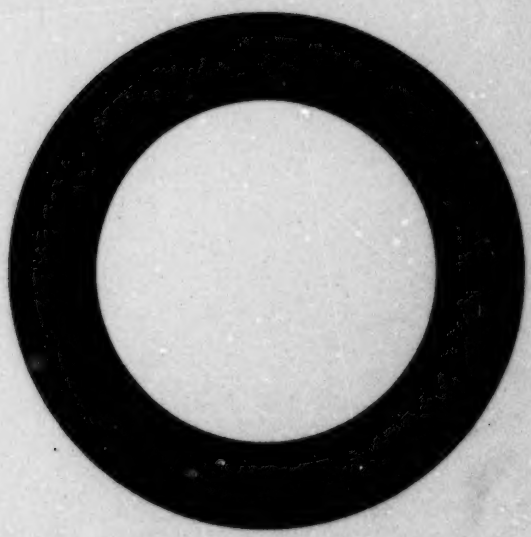
Draft resolution A/C.6/59/L.17

52. **Mr. Samy** (Egypt) introducing the draft resolution on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (A/C.6/59/L.17), said that its language built on the previous year's resolution on the same subject in order to reflect both the developments in the work of the Special Committee and the proposals under consideration by it. Paragraph 9 of the draft resolution, which concerned the establishment of a trust fund to eliminate the backlog of the *Repertory of Practice of United Nations Organs*, had been newly added in accordance with the recommendations contained in the Special Committee's report (A/59/33). After drawing attention to the dates of the next session of the Special Committee set out in paragraph 2, he expressed the hope that the draft resolution would be adopted by consensus.

Draft resolution A/C.6/59/L.18

53. **Mr. Ilnytskyi** (Ukraine) introduced the draft resolution on implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions (A/C.6/59/L.18) on behalf of the sponsors. The text, which was based largely on the previous year's resolution, took into account the results of the Security Council Working Group on general issues relating to sanctions, the relevant provisions of the reports of the Secretary-General (A/59/1 and A/59/334) and of the Special Committee (A/59/33), and the Sixth Committee's discussion of the question of sanctions. In view of the importance which delegations attached to the question of implementing Article 50 of the Charter, as well as the wide range of views expressed regarding ways and means of doing so, the sponsors had attempted to reflect in the text ideas which would receive general support. Drawing attention to paragraph 10, he said that it had been slightly rephrased as compared with the previous year's resolution to take into account the recommendation contained in paragraph 27 of document A/59/33. The sponsors believed that the text had been drafted in a balanced and non-controversial manner and therefore hoped that it would be adopted by consensus.

The meeting rose at 4.40 p.m.



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Chairman: Mr. Bennouna ..... (Morocco)

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04-59734 (E)

The meeting was called to order at 9.55 a.m.

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/59/10)

1. **Mr. Hasegawa** (Japan), referring to chapter X of the report of the International Law Commission (A/59/10), said that since the number of bilateral and multilateral treaties had increased dramatically in recent years, it was becoming more difficult to maintain coherence among the different legal regimes. To avoid conflicts of law during the treaty-making process and in interpretation, it was essential for practitioners to have a clear understanding of the potential impact of a particular treaty on other related rules of international law. For that reason, his delegation basically supported the direction the Commission was taking on the topic of fragmentation of international law.

2. The reports on the five selected subtopics were still quite general in content, and the suggestion appeared to be that guidelines derived from them could be applied to broad areas of international law. However, the Commission should be careful about extrapolating guiding principles from a few specific cases or areas. The Commission might have to decide at a later stage whether it should narrow the scope of application of the guidelines it would propose or embark on a much more thorough study of each aspect of a potential conflict of law. To be beneficial, the guidelines should be produced in a timely manner. One possible approach would be to limit the scope of the guidelines by adding a saving clause stating that they would not prejudice the possible development of other laws and agreements on related subjects.

3. The topic of unilateral acts of States (A/59/10, chap. VIII) was a difficult one. The definitions of terms and the criteria for classification of unilateral acts were unclear, and the precise legal consequences of unilateral acts had yet to be examined. To clarify those points, detailed analysis of actual practice would be necessary. The Special Rapporteur had therefore been correct to devote most of his seventh report (A/CN.4/542 and Corr.2 and 3) to the examination of State practice. It should be borne in mind, however, that Governments might not clearly define the legal nature of their own acts, so that the Commission should take into account not only the objective elements of the acts themselves but also subjective elements such as the intent of the States in question.

4. If the Commission felt that useful output could not be anticipated from its work on the topic in the near future, Japan would not insist on its continuation. If it decided to continue, however, even more detailed and careful research might be required.

5. While his delegation shared the view of the Special Rapporteur that the draft guidelines on reservations to treaties (A/59/10, chap. IX) should be as detailed and comprehensive as possible, it was also concerned about the slow pace of the work on the topic. The Commission should take steps to hasten the discussion on key issues, such as the legal consequences of reservations to treaties, and set a time frame for the completion of the work.

6. His delegation supported the approach that the Special Rapporteur had taken to objections to reservations in defining the term "objection" prior to any examination of its legal effects or the lawfulness of objections, and it found the newly proposed definition satisfactory. With regard to the validity of a reservation and the debate over the correctness of the term "validity", his delegation considered that the choice of the term was related to the legal nature of the system of reservations. The system provided for in the Vienna Conventions on the Law of Treaties allowed each State party some discretion to decide for itself on the compatibility of a reservation through acceptance or objection. Where a reservation was not clearly prohibited, a situation could arise in which a reservation was "valid" in relation to one State but "invalid" in relation to another. In such a case, the relationships between the States parties were reciprocal and bilateral, and it might be more appropriate to use the terms "permissible"/"impermissible" than to use the terms "valid"/"invalid". If, on the other hand, the reservation was clearly prohibited by the treaty, it would be reasonable to consider the reservation null and void by virtue of its nature and therefore "invalid". Moreover, some multilateral treaty obligations could not be divided into reciprocal and bilateral obligations, since they required States parties to act in accordance with normative rules, such as those relating to human rights, disarmament and the environment. A reserving State could not act in accordance with a normative rule towards one State while acting contrary to it vis-à-vis another. In such cases, the terms "valid"/"invalid" seemed more appropriate.

7. **Mr. Deo** (India), referring to the topic of responsibility of international organizations (A/59/10, chap. V), said that unlike States, international organizations varied considerably in their structure, functions and competences, which made it difficult to devise a standard set of rules. There were limits on the extent to which analogies could appropriately be drawn with regard to attribution of responsibility to States; accordingly, the Commission should avoid developing rules for international organizations that mirrored the rules intended for States in the draft articles on State responsibility.

8. Turning to the Commission's commentary on draft article 5, he said that it was not clear whether the test of "effective control" would be adequate to deal with all situations where the draft article would be applicable.

9. With respect to shared natural resources (A/59/10, chap. VI), India had consistently maintained that context-specific agreements and arrangements were the best way of addressing questions relating to transboundary groundwaters or aquifer systems, as they would enable States to take the relevant factors in a specific negotiation into account. The final form of the output on that topic should give States adequate flexibility to tailor agreements or arrangements to individual circumstances. India would support the adoption of guidelines that could be used for the negotiation of bilateral or regional arrangements.

10. His delegation agreed on the use of the term "transboundary groundwaters" and "transboundary aquifer systems" instead of "confined transboundary waters". It also agreed that it would be inappropriate to apply the principle of "equitable use" for the purpose of building a regime on groundwater; moreover, the principle of "reasonable utilization" might not be helpful. Since both concepts were embodied in the 1997 Convention on the Law of the Non-Navigational Uses of Transboundary Watercourses, to which many Member States were not parties, it might prove difficult to insist on them.

11. The fragmentation of international law was one of the realities of current international relations and the work of the Study Group had highlighted the complexities arising from lex specialis and self-contained regimes. His delegation believed that the study on fragmentation would serve to enhance the effectiveness of international law and looked forward to the Group's future work on regional regimes and regionalism.

12. **Mr. Peesteen de Baytswerve** (Belgium) said it was clear that a reservation prohibited or excluded by a treaty or incompatible with its object and purpose, in other words, contrary to the provisions of article 19 of the Vienna Convention on the Law of Treaties, could not have the legal effects specified in article 21 of the Convention, regardless of whether or not the reservation had been accepted. It was generally considered that a legal act was devoid of legal effect if it was null and void or unlawful or non-opposable. Article 19 of the Convention appeared to be stating rules having to do with the validity of reservations, so that reservations contrary to them should be qualified as null and void.

13. The provisions of article 2, paragraph 1 (d), and article 23, paragraph 1, of the Convention on the timing and form of a reservation could also be considered conditions of validity. More generally, a reservation should be considered void if it conflicted with a peremptory norm of general international law pursuant to article 53 of the Convention, or if there was a defect in consent pursuant to articles 46 to 52, applied mutatis mutandis. Without elaborating an entire regime on the nullity of reservations, the Commission could mention the problem in its guidelines.

14. It was clear, therefore, that if a contested reservation was contrary to article 19 of the Vienna Convention it should be considered void and without effect, and the author of the reservation would remain bound by the entire treaty, including the provisions to which the void reservation related until such time as the treaty lapsed or was denounced. The mere formulation of a void reservation would not entail international responsibility, since it had no legal effect, but the reserving State might incur responsibility for an internationally wrongful act if it did not observe the provisions of the treaty to which the reservation related.

15. His delegation saw no need to distinguish between cases in which a reservation contrary to article 19 constituted an essential condition of consent for the State that had formulated it and other cases. Belgium considered that a State could not argue that a reservation contrary to article 19, formulated at the time the State had consented to be bound by the treaty, had been an essential condition of consent and that

therefore it did not consider itself bound by the treaty. However, if the Commission thought it useful to make such a distinction, it should, in order to avoid abuses, elaborate very precise guidelines on what constituted an "essential condition of consent" and how it could be attributed to a reservation.

16. **Mr. Onisii** (Romania) welcomed the provisional adoption of draft articles 4 to 7 on responsibility of international organizations. With regard to draft article 4, his delegation noted with satisfaction the replacement in paragraph 1 of the words "one of its officials or another person entrusted with part of the organization's functions" with the word "agent", as subsequently defined. The definition of "rules of the organization" in paragraph 4 had been improved, as compared with the definition of the term in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, by adding the words "other acts taken by the organization" and by giving considerable weight to practice. However, the definitions would be better placed in draft article 2, "Use of terms", since the terms also appeared in other draft articles. His delegation supported the inclusion and current wording of draft articles 5 to 7.

17. On the topic of shared natural resources, his delegation considered that the Special Rapporteur's second report represented an excellent basis for further work. Whatever the final form of the instrument on the topic, it should clearly set out its applicability to transboundary aquifer systems and to the uses of, activities which had or were likely to have an impact upon and measures of protection, preservation and management of transboundary aquifer systems. Cooperation between States was essential for the equitable and reasonable utilization of transboundary aquifer systems and should be properly reflected in the draft articles.

18. His delegation welcomed the large compilation of State practice in the Special Rapporteur's seventh report on unilateral acts of States, while realizing that the report represented only an initial overview, to be followed by in-depth analysis of such acts aimed at identifying the relevant rules for codification and progressive development. It was to be hoped that the difficulties encountered in identifying appropriate working methods on the topic would be overcome once the studies undertaken in accordance with the grid established by the open-ended Working Group were completed and transmitted to the Special Rapporteur. Romania wished to reiterate the importance it attached to the elaboration of a set of principles applicable to unilateral acts, since they represented a source of legal norms.

19. **Ms. Ng** (Singapore) noted with satisfaction the provisional adoption by the Commission of the draft guidelines on reservations to treaties at its fifty-sixth session. Her delegation appreciated the careful and considered treatment of the issues dealt with therein and the pragmatic approach taken on the question of widening the scope of reservations. Singapore shared the Commission's view that the late formulation of limitations on the application of the treaty should not be encouraged, and that there might be legitimate reasons why a State might wish to modify an earlier reservation. In the final analysis, prevailing practice should be taken into account.

20. Welcoming the intention of the Special Rapporteur to deal with the "validity" of reservations in a future report, she referred to the effect of reservations, as covered by article 19 of the Vienna Convention on the Law of Treaties, and suggested that a distinction could be drawn between reservations within the scope of article 19, subparagraphs (a) and (b), and those falling under article 19, paragraph (c). Singapore would not argue that a State could accept a reservation prohibited by the treaty within the scope of subparagraphs (a) and (b). On the other hand, it did not understand why, in principle, the regime described in articles 20 and 21 of the Vienna Convention could not apply to reservations under article 19, paragraph (c).

21. Her delegation shared the sentiment expressed by the Special Rapporteur in paragraph 20 of his ninth report, in which he stated his particular attachment to the "contractual character" of treaties and to the voluntary nature of treaty commitments. Singapore regarded those sentiments as a fundamental basis for treaty relations as it was, like the Special Rapporteur, reluctant to recognize any rule which would result in allowing a State to be bound against its will by any treaty provision. Furthermore, Singapore shared the doubts raised regarding the possibility for an objecting State to maintain that the treaty as a whole was binding upon a reserving State despite its reservation. In that connection, she referred to an advisory opinion handed down by the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide concerning the

status of a reserving State as a party to the Convention. In that opinion the Court contended that a reserving State whose reservation had been objected to by one or more parties might be regarded as a party to the Convention if the reservation was compatible with the object and purpose of the Convention, and would not be regarded as a party to the Convention if the reservation was incompatible with the Convention.

22. The decisions of the European Court of Human Rights in the *Belilos* case and the *Loizidou v. Turkey* case were not of general application and should be seen in the light of particular circumstances. In terms of legal obligations, Singapore believed that the position advocated in the advisory opinion contributed to greater participation and universality of treaties, as well as to the stability of the international treaty regime. The possibility that a State could be bound by a treaty provision would operate as a deterrent to the participation of States in a treaty and would create tremendous uncertainty in legal relations between States, particularly in cases where parliamentary approval to ratify the treaty was given on condition that a particular reservation was made. In the event that a reservation had been objected to by a State for failing the test of compatibility with the object and purpose of the treaty, it would be preferable for the reserving State to reconsider the objection in good faith and decide thereafter on the appropriate course of action.

23. **Ms. Zabolotskaya** (Russian Federation) said, with regard to reservations to treaties, that her delegation supported the current formulations of draft guidelines 2.3.5 ("Widening of the scope of a reservation"), 2.4.9 ("Modification of an interpretative declaration") and 2.5.13 ("Withdrawal of a conditional interpretative declaration"). As for draft guideline 2.6.2 ("Objection to the late formulation of widening of the scope of a reservation"), the text of which was also acceptable, it could be included in the definition contained in draft guideline 2.6.1 ("Definition of objections to reservations"). With regard to draft guideline 2.4.10 ("Limitation and widening of the scope of a conditional interpretative declaration"), her delegation saw no difficulty as far as the limitation aspect was concerned, since the scope of such a declaration could obviously be modified only after agreement had been reached on the binding nature of the treaty. The same did not apply in the case of the widening of an interpretative declaration. It was not clear what would happen to a treaty if the other parties did not all accept the proposed widening. Moreover, a declaration might contain both widening and limiting elements. Widening the scope of such a declaration might therefore be detrimental to the stability of legal relations within the framework of the treaty. Moreover, the formulation whereby the rules on the widening or limitation of a conditional interpretative declaration were explained by reference to draft guideline 2.3.5, which in turn referred the reader to draft guideline 2.3.1 ("Late formulation of a reservation"), was not entirely successful. The definition of an objection to a reservation should be structured, together with the commentary, in such a way that a clear distinction was made between legal objections, on the one hand, and political declarations expressing a negative attitude to a reservation but having no legal repercussions, on the other. Moreover, the definition of an objection to a reservation should not rely exclusively on the consequences of an objection as provided for in the 1969 Vienna Convention.

24. With regard to unilateral acts of States, the heterogeneity of the acts compiled in the report of the Special Rapporteur (A/CN.4/542 and Corr.1-3) went a long way towards explaining why the Commission had not made more headway in its work. Her delegation supported the suggestion that the Commission should prepare a detailed thematic study analysing a specific range of unilateral acts. Codification would, however, prove extremely complex or even impossible. The main problem would be to produce a definition of unilateral acts that could, in every case, distinguish a unilateral legal act from an act of a purely political nature giving rise to no legal consequences. To base a definition on a State's intention alone seemed unsafe, since it was extremely subjective. The decision by the International Court of Justice in the *Nuclear Tests* case should not automatically be adopted as a basis for the Commission's work. Much depended on the subject of the unilateral act, for example. If that subject could be clearly defined and was of an explicitly legal nature, such as a unilateral and explicit waiver by a State of a right belonging to it, the act concerned could be considered to be of a legal nature.

25. With regard to the criteria for the validity of unilateral acts, the question to be asked was whether such acts could, as in the case of international treaties, deviate from the residual rules of international law. As for the necessary conditions for the modification or withdrawal of a unilateral obligation assumed by a

State, it was doubtful whether a direct analogy with treaties — in relation, for example, to the "threshold" for the implementation of a rule on a fundamental change of circumstances as grounds for terminating an obligation — could be justified.

26. The fragmentation of international law was an important topic that was rightly under consideration by the Commission, even if the "threat" of such fragmentation was no more than theoretical. Her delegation agreed with a number of conclusions drawn by the Study Group, such as that regarding the importance of international law as a backdrop to special regimes. The fact that, in some cases, lex specialis prevailed over lex generalis did not mean that a special regime could be considered apart from general international law. Indeed, the whole point of special rules within the framework of international law was to change or modify the operation of general rules within a specific legal relationship and in response to specific regulatory requirements. On the other hand, the abrogation of a special rule did not automatically give rise to a lacuna in legal regulations, since the corresponding general rule automatically applied. In that connection, she emphasized that not a single one of the existing treaty regimes, including the international human rights treaties and the rules of the World Trade Organization, could be termed autonomous in the sense of excluding the application of general international law. The same applied to the practice of the European Court of Human Rights, in the *Belilos* and *Loizidou* cases, for example. Nor did the human rights treaty bodies show any evidence of being autonomous or self-sufficient.

27. Her delegation shared the Study Group's view that the hierarchy of rules in international law did not, on the whole, result in its fragmentation but, on the contrary, constituted an integral part of its strength and unity. Clearly there was no formal hierarchy, as in the case of national laws, but there were undoubtedly generally recognized peremptory principles and rules that constituted the basic structure of international law and were endowed with particular authority and legal force. Along with such jus cogens principles and rules, there existed "sectoral" principles of international law whose scope was essentially restricted to specific areas of regulation. As for the interpretation of article 31, paragraph 3 (c), of the 1969 Vienna Convention, her delegation shared the view that it referred both to treaty rules and to general rules.

28. **Ms. Huh** Jung-ae (Republic of Korea) said, with regard to unilateral acts of States, that before States could submit comments on their practices in that regard, they required further guidance from the Commission concerning the scope and definition of such acts. It was currently unclear whether a State's statements, conduct or national legislation constituted unilateral acts, whether such acts had to be in written form or could be oral and whether they had to be formally communicated at all. There was also uncertainty with regard to the normative status of the concept in international law. It was not clear whether unilateral acts could be regarded as a new source of international law beyond the scope of Article 38, paragraph 1, of the Statute of the International Court of Justice or whether they contributed to the formation of existing sources of international law, including treaties and customs, as demonstrated by the effects of the Truman Proclamation on the Continental Shelf or Norwegian claims for straight baselines on the evolution of the law of the sea. There were other questions, such as whether unilateral acts involved obligations only vis-à-vis the addressee, without actually creating a norm, or whether they were analogous to the law of treaties. Currently, international law did not provide definitive answers. While extremely complex, unilateral acts of States were also important in international relations.

29. Case law, as demonstrated in the *Eastern Greenland* case and the *Nuclear Tests* case, attested to the significance of the legal consequences of unilateral acts and the relationship between the author and the addressee. Her delegation endorsed the Special Rapporteur's approach of conducting an in-depth study on State practice and case law in order to establish any general rules that might apply.

30. With regard to reservations to treaties, her delegation noted that article 19 (c) of the 1969 Vienna Convention was intended to prevent States from formulating reservations incompatible with the object and purpose of a treaty. The International Court of Justice, in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, had given clear guidance in that regard, stating that other parties to a treaty were entitled to decide the question of incompatibility. If they objected to a reservation, they could consider the reserving State not to be a party to the Convention. By contrast, the Human Rights Committee, in its General

Comment No. 24, had claimed for itself the right to decide on the incompatibility of a reservation with the object and purpose of the International Covenant on Civil and Political Rights and to refuse to accept the reservation. That approach, however, had failed to attain general agreement from the States Parties to the Covenant, diverging as it did from the rules established by the International Court of Justice and the Vienna Convention. In her delegation's view, the Commission should base its work on the Court's case law, while State practice should be based on the relevant provisions of the Vienna Convention.

31. With regard to the question of the terminology for qualifying reservations made in breach of article 19 of the Vienna Convention, her delegation believed that the wording should, again, reflect the jurisprudence of the International Court of Justice. Since other parties to a treaty were entitled to judge whether a reservation was in conformity with the object and purpose of the treaty in question, the word "admissibility" would correctly reflect the situation of supervision or monitoring between equal sovereign States, whereas the word "permissibility" implied that an organ superior to States decided what was or was not compatible. Meanwhile, the word "validity" might lead to the prejudging of the legal consequences of a reservation that allegedly violated the provisions of article 19 of the Vienna Convention, although the reservation would in fact be effective unless other States lodged an objection.

32. Lastly, with regard to the topic of fragmentation of international law, her delegation trusted that, while the Study Group's work had so far been of a highly theoretical nature, the outcome would be of practical use to States.

33. Mr. Peh (Malaysia) reiterated his delegation's support for the efforts of the Commission to elaborate clear guidelines for determining when unilateral acts of States created legal obligations in furthering legal security.

34. Noting the Commission's general view that the seventh report of the Special Rapporteur lacked an in-depth analysis of the examples of State practice in relation to unilateral acts that had been cited, he said that the report had also failed to address the issues raised in recommendation 6 of the Working Group's set of recommendations.

35. With reference to the request by the Commission for comments on the elements outlined in paragraph 31 of its report with respect to various related aspects of State practice, he asked the Commission to further clarify and elaborate on the comments expected from States.

36. Malaysia shared the views expressed by the Commission on criteria for the classification of acts and declarations. It agreed that an act might belong to more than one of the three generally established categories proposed by the Special Rapporteur, and that therefore such categorization of acts might not be the most appropriate in the current instance.

37. His delegation also maintained the view that it was pertinent for States to know when a unilateral expression of their will or intentions would be taken as a legally binding commitment as opposed to being a mere political statement. The determination of the purpose of a particular unilateral act was therefore essential in identifying the nature of the act and whether it was in fact legal or political. Other factors, such as context, circumstances, content and form, could also be considered in determining the nature of a unilateral act.

38. On the issue of revocability, Malaysia supported the proposal in paragraph 228 of the Commission's report for a detailed examination of the revocability of unilateral acts, which would assist States in better understanding the matter.

39. Malaysia recognized the difficulty and complexity of the task of determining the general rules and principles that might apply to the operation of unilateral acts of States. However, until and unless a comprehensive analysis of State practice could be carried out, the formulation of legal rules, if any, should be deferred.

40. Turning to the topic of reservations to treaties and to the effect of reservations covered by the provisions of article 19 of the Vienna Convention on the Law of Treaties, reservations contrary to the provisions of a treaty to which they related, or reservations contrary to the object and purpose of a treaty, he expressed the view that such reservations were ineffective, that is, null and void. Such a reservation would therefore not produce the result intended by the reserving State, and the treaty as a whole would continue to govern that State. Furthermore, the existing treaty relationship between the reserving State and other States parties

would not be affected in any manner whatsoever, and the reserving State should not be able to invoke the reservation in its treaty relationship with the other States parties. In that regard, Malaysia supported the view that State parties should be encouraged to make objections to "impermissible" reservations in order to indicate to the reserving State their positions with regard to the legal status of the reservation in question. However, rather than placing the burden on States to make their objections known, the Sixth Committee should introduce some formulation to the effect that even though no objections had been made, impermissible reservations had no force or effect.

41. His delegation supported the current formulation of draft guideline 2.1.8 [2.1.7] (Procedure in case of manifestly [impermissible] reservations), and saw the proposal therein as a step forward in addressing the issue of "impermissible" reservations. Nevertheless, Malaysia believed that it was necessary to obtain comments from Member States, in particular, on the suitability of the depositary undertaking the role of analysing and drawing conclusions on particular reservations upon which States would be required to act.

42. **Mr. Gumbley** (Australia) said that the definition of a unilateral act entailing a legal obligation required close study. In order to decide whether an act was a unilateral act creating obligations under international law, it was necessary to consider unilateral acts stricto sensu and to submit States' intention to create such an obligation to an objective examination. For the purpose of determining what legal obligations stemmed from unilateral acts, the latter had to be defined as acts distinct from any act undertaken within the framework of existing conventions or of customary or institutional law. It would be advisable to formulate guidelines regarding the legal consequences of unilateral acts. Since such acts did not constitute a legal regime, they did not lend themselves to legal codification.

43. As for the topic of reservations to treaties, his Government was pleased that the concept of a State's "intention" had been introduced into the new definition of an objection in draft guideline 2.6.1, because intention was key to determining whether a State's reaction to a reservation amounted to an objection, and the incorporation of that notion was consistent with articles 20 to 23 of the Vienna Convention on the Law of Treaties.

44. Both the treaty-based and the voluntary nature of the regime of objections should be preserved. When reservations under a treaty were allowed and a State had voluntarily made a reservation, objecting States could not deem a treaty to be binding in its entirety on a reserving State.

45. Draft guideline 2.1.8 prompted some concern, since the depositary should not be expected to judge or express a view on the impermissibility of a reservation, but should be neutral and impartial in the exercise of its functions in keeping with the provisions of article 77 of the 1969 Vienna Convention. Its role should thus be limited to transmitting reservations to the States parties to a treaty.

46. **Mr. Ascencio** (Mexico) said that the Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/59/10, Chap. VII) would greatly help States to achieve the aims of the 1992 Rio Declaration on Environment and Development. The scope of the legal regime resulting from the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities should be general and residual in character and should allow States a sufficient degree of flexibility in its application.

47. Although the question of the global commons was complex and called for separate treatment, damage to the commons should be considered at a later stage, in order to provide a comprehensive overview of the topic, which acknowledged the planet's ecological unity and the needs of current and future generations.

48. The instrument should take the form of draft articles, so that the allocation of loss received the same treatment as the prevention of transboundary harm, because the two regimes were closely bound up with each other. In order for that to be done, however, the draft principles would have to be formulated in more detailed, practical terms. His delegation concurred with the key notion that innocent victims should not suffer loss from transboundary harm and that they should receive prompt and adequate compensation. Liability must be attached primarily to the operator and should not require proof of fault. The operator should bear strict liability in keeping with international instruments on civil liability. Nevertheless, provision must be made for supplementary funding mechanisms ensuring that additional compensation could be paid by

compensation funds and, in some cases, by the State itself. The Commission's decision to include the concept of damage to the environment per se was welcome; future commentaries should therefore explore methods of assessing environmental damage, including impairment of its non-use value.

49. **Mr. Kanu** (Sierra Leone) said that his statement would cover Chapters IV, V, VII, VIII, X and XII of the report. The draft articles on diplomatic protection had contributed significantly to the codification and progressive development of international law. Draft article 16 (a) concerning the exhaustion of local remedies was flexible and clear. Although the basic rule set forth in article 9 was acceptable, further clarification was required when determining the State of nationality of a corporation, because the seat of management might sometimes be located in different jurisdictions. While article 5 laid down precise conditions for the protection of natural and legal persons, the same could not be said of the protection of shareholders; a reference to their nationality at the time of the injury, or a cross reference to the articles on natural persons, might prevent the sale of shares or a change of nationality for reasons of convenience. Article 14 should be read in conjunction with the exceptions listed in article 16. As for article 19, it was doubtful whether the State of nationality of the ship would be able to afford the crew diplomatic protection, especially when the ship's nationality was one of convenience. Moreover, the text did not make it plain whether the crew's nationality or the ship's nationality took precedence.

50. The general approach adopted by the Commission in proposing four draft articles on the responsibility of international organizations was commendable. The topics the Special Rapporteur intended to address in his third report warranted consideration, as did the responsibility of member States of an international organization for the acts of their organization as a result of their membership or of their normal conduct associated with their membership. That topic was susceptible of being regulated by the general rules of international law and there was a certain amount of existing law and practice on the subject, which would suggest that it was ripe for codification.

51. As his country shared some of its natural resources with its neighbours, it particularly welcomed the general framework provided by the Special Rapporteur on that topic. The principles of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses offered a sound basis for a groundwaters regime.

52. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he expressed agreement with the general thrust of the eight draft principles on the allocation of loss, especially the concept that the main liability was incurred by the operator and that the State could adopt measures to secure adequate compensation. His delegation was also in favour of the principle of prompt and adequate compensation for victims and the inclusion of damage to the environment in the principles.

53. His Government supported the establishment of a working group on unilateral acts of States, but was sceptical about the feasibility of differentiating unilateral acts of a political nature from those of a legal nature. It further believed that the subtopic "Principles of the rule of law in the international legal system" should be included within the topic of the fragmentation of international law, because such fragmentation might have significant repercussions on the rule of law. A guide to future law-making activities, in the shape of a set of principles, would be of great value to the international community.

54. The Commission's decision to cover the topics of the obligation to extradite or prosecute, the expulsion of aliens and the effects of armed conflicts on treaties was welcome. It might likewise be advisable for the Commission to consider a model code of professional conduct for advocates and counsels before the International Court of Justice, as not only did the subject meet the criteria for inclusion, but recent incidents had also revealed the urgency of ensuring the quality of States' representation before the Court. That state of affairs harmed the interests of the States concerned and might affect international relations.

55. **Mr. Khan** (Pakistan), referring to the topic of reservations to treaties, said that the Vienna Conventions of 1969, 1976 and 1986 relating to the law of treaties had served the international community well and were virtually universally accepted and observed; article 19 of the 1969 Vienna Convention had, in particular, proved itself to be flexible and posed few problems. The existing regime struck a balance between limitations on a State's ability to formulate a

reservation incompatible with the object and purpose of a treaty and the goal of universal ratification.

56. All treaties implied contractual obligations and his delegation did not believe a distinction should be made between human rights and other treaties. If States were not allowed to formulate reservations to human rights treaties, that might prove an obstacle to the goal of achieving universal ratification. His delegation likewise was not in favour of the establishment of a monitoring body to review the validity of a State's reservation to a treaty, which could also prove an obstacle to the goal of universality; it should be left to the State concerned to determine whether a reservation would be consistent with the object and purpose of a treaty.

57. Although his delegation was of the opinion that the existing regime regarding the law of treaties should not be altered, that did not mean that it opposed efforts to consider and clarify specific provisions and concepts. The final product arising out of any such review should, however, be formulated only in the form of guidelines.

58. **Mr. Melescanu** (Chairman of the International Law Commission) expressed appreciation for the views expressed by the Committee. The members of the Committee provided valuable policy guidance to the Commission in its work, and he stressed the importance of delegations submitting written statements of their positions with regard to the draft articles on diplomatic protection and on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted by the Commission on first reading. Such statements would be very valuable to the Commission during its discussion of those articles on second reading and would, of course, be provided to the Special Rapporteur and fully taken into account. He also expressed appreciation for the free and open nature of the dialogue with the Committee during informal consultations with legal advisers present.

Agenda item 139: Responsibility of States for internationally wrongful acts (*continued*)
(A/C.6/59/L.22)

Draft resolution A/C.6/59/L.22

59. **Ms. Ramoutar** (Trinidad and Tobago) introduced the draft article on behalf of the Bureau. She noted, with regard to paragraph 3, that the Secretary-General was requested to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles on responsibility of States for internationally wrongful acts contained in the annex to General Assembly resolution 56/83 and to invite Governments to submit information on their practice in that regard; it was not, however, intended that the Secretary-General should make any attempt to interpret the articles or any decision relating to them. She recommended that the draft resolution be adopted without a vote.

Agenda item 142: Convention on jurisdictional immunities of States and their property (*continued*)
(A/C.6/59/L.16)

Draft resolution A/C.6/59/L.16

60. **The Chairman** said that the United Nations Convention on jurisdictional immunities of States and their property would be opened for signature at Headquarters on 17 January 2005 for a period of two years, until 17 January 2007; those dates would be added to article 28 and to the final clause of the Convention.

61. *Draft resolution A/C.6/59/L.16 was adopted.*

The meeting rose at 12.05 p.m.

United Nations A/C.6/59/SR.26

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Summary record of the 26th meeting
Held at Headquarters, New York, on Wednesday, 17 November 2004, at 10 a.m.

Chairman: Mr. Bennouna ..... (Morocco)

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04-61246 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 145: Report of the Committee on Relations with the Host Country (A/59/26)

1. **Mr. Mavroyiannis** (Chairman of the Committee on Relations with the Host Country), introducing to the Sixth Committee the report of the Committee over which he presided, said that the Committee on Relations with the Host Country was an important forum characterized by its openness, transparency and flexibility. The consensual nature of its proceedings had ensured that the interests of all its members could be met. During the current year, an issue that had generated intense interest had been the implementation of the New York City parking programme for diplomatic vehicles, which had been in effect for one year.

Draft resolution A/C.6/59/L.15

2. **Mr. Mavroyiannis** (Cyprus), introducing draft resolution A/C.6/59/L.15 on behalf of all the sponsors (Bulgaria, Canada, Costa Rica, Côte d'Ivoire and Cyprus), said that the Committee on Relations with the Host Country had been established in 1971 to discuss and resolve issues pertaining to the security of missions and the safety of their personnel, issues arising in connection with the implementation of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations and questions regarding privileges and immunities, transportation, and public relations of the United Nations community in the host city. Noting that the draft resolution endorsed the conclusions and recommendations of the Committee contained in paragraph 26 of its report (A/59/26), he commended it to the Sixth Committee and expressed the hope that it would be adopted by consensus.

3. **Mr. Peersman** (Netherlands), speaking on behalf of the European Union and the candidate countries Bulgaria, Romania and Croatia, the countries of the Stabilization and Association Process and potential candidates Albania, Bosnia and Herzegovina, The former Yugoslav Republic of Macedonia, Serbia and Montenegro and the European Free Trade Association (EFTA) countries Iceland and Norway, members of the European Economic Area, thanked the Committee on Relations with the Host Country for its work. That Committee remained an important forum for resolving problems which might arise for the day-to-day functioning of the delegations and missions accredited to the United Nations in New York and contributed to good relations between the Organization, Member States and the host country. The European Union thanked the host country for its efforts to accommodate the interests and requirements of the diplomatic community in New York. The European Union also wished to thank Ambassador Mavroyiannis for his introduction of the Committee report, which dealt with such varied problems as those relating to transportation, immigration and customs procedures, entry visas and travel regulations. With regard to transportation, he said that the European Union appreciated the efforts of the Secretariat in compiling a comprehensive database of the submissions from permanent missions on their experience with the implementation of the diplomatic parking programme. It took note of the problems that had been identified, as well as of the results of the consultations between the Chairman, the city authorities and the host country Mission. The European Union had studied carefully the report of the Committee on Relations with the Host Country and was pleased to support its recommendations and conclusions.

4. **Mr. Ganeson** (Malaysia) said that, since the establishment of the Committee, it had been a forum for the exchange of views and negotiations between the United Nations, the Member States and the host country to address practical issues encountered by missions and ensure their smooth operation. Malaysia appreciated the commitment of the United States to extend to the diplomatic community the full scope of the immunities and privileges embodied in the Vienna Convention on Diplomatic Relations, the Convention on the Privileges and Immunities of the United Nations and the Headquarters Agreement. In return, the host country had the right to expect that members of the diplomatic community would not abuse the privileges and immunities accorded to them or disregard the framework of understanding and cooperation that required continuous dialogue.

5. The issue of parking continued to dominate the discussions of the Committee. The new New York City parking programme for diplomatic vehicles was a positive development, but it was still necessary to allow flexibility in the transferring of decals, to provide parking spaces in front of diplomatic

residences and to improve the parking ticket dispute mechanism.

6. Malaysia would like to highlight the increasing difficulties faced by diplomats in the clearance of their household effects by United States Customs, leading to delays that entailed costly additional storage and demurrage charges. While understanding the need for the host country to take measures to ensure that goods imported did not pose a danger to its security, his delegation hoped that such measures applying to diplomats would conform to the Vienna Convention on Diplomatic Relations. In conclusion, he said that his delegation fully supported the recommendations and conclusions contained in paragraph 26 of the report of the Committee.

7. **Mr. Sinaga** (Indonesia) said that his country attached great importance to the work of the Committee on Relations with the Host Country as a forum for discussion of the practical issues that affected the work of diplomatic missions to the United Nations. Indonesia believed that the host country had been working diligently to create appropriate conditions for the work of delegations and missions and hoped that the situation would continue improving in future. There had been cases of immigration and customs delays, particularly with regard to the importation of household effects, leading to additional storage and unnecessary demurrage charges. His delegation hoped those problems could be avoided in the future. In that regard, the host country might institute a review mechanism for possible compensation to members of diplomatic missions who had experienced that problem. Indonesia felt that it was premature to conclude that the new parking programme had been successful, as only 12 per cent of the permanent missions had expressed their views on the matter. He noted that there were still problems; the number of parking spaces was still inadequate, the appeal process was slow, and there was a need for transparency so as to ensure fair and non-discriminatory treatment for all missions to the United Nations. It was understandable that the host country should expect all diplomatic personnel to comply with traffic laws and not abuse the privileges and immunities accorded them. It was also fair to expect that the full scope of immunities and privileges enshrined in international law was ensured by the host country. Continued review of the parking programme was necessary in order to ensure that it was implemented in a fair, non-discriminatory and effective manner, consistent with international law and was not used as an instrument of political pressure with respect to certain countries. In conclusion, Indonesia welcomed the recommendations and conclusions contained in paragraph 26 of the Committee's report and supported the proposal made by the Russian Federation for the establishment of a working group to discuss the issues.

8. **Mrs. Ramos Rodríguez** (Cuba) said that her delegation was interested in contributing to the work of the Committee on Relations with the Host Country. It was very important that, in carrying out its duties, the Committee should apply the relevant provisions of the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations and the Headquarters Agreement.

9. The conclusions and recommendations contained in the report addressed issues of great importance, such as the travel restrictions imposed by the host country on personnel of certain missions and staff members of the Secretariat of certain nationalities and the need to ensure the issuance, in a timely manner, of entry visas to representatives of Member States. The host country had arbitrarily and unfairly denied a Cuban delegate's request to travel to the informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, held at Princeton University in June 2004. Her delegation regretted that on certain occasions the host country authorities were continuing to deny Cuban diplomats' requests for travel permits to attend United Nations-related events and meetings organized by accredited missions to the Organization that were held outside the 25-mile radius usually applied in restricting the travel of diplomats. That practice placed officials of the Cuban Mission at a disadvantage with regard to negotiations, discussions and documentation. The practice was unfair, selective and discriminatory, as well as politically motivated; it violated the host country's obligations as laid down in the Headquarters Agreement, as well as customary rules of diplomatic law. Her delegation called on the host country to reconsider its position on the issues she had mentioned and observe the general principles of equality and non-discrimination, as well as the norms of international law.

10. The Cuban delegation welcomed the Committee's initial detailed review of the implementation of the parking programme for diplomatic vehicles, conducted

with a view to resolving the problems encountered by some permanent missions during the first year of implementation. The programme included certain controversial provisions relating to privileges and immunities that were universally recognized and accepted for diplomatic missions and their agents. From the practical standpoint, the programme entailed an additional financial and bureaucratic burden for the missions and their personnel; moreover, the competent authorities had applied enforcement measures that were not envisaged in the programme.

11. Finally, her delegation wished to reiterate the importance of ensuring that the Committee effectively fulfilled its role of providing ongoing advice to the host country on issues arising from the implementation and interpretation of the Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations.

12. **Mr. Lobach** (Russian Federation), referring to the report of the Committee on Relations with the Host Country, said that the New York diplomatic parking programme did not contain mechanisms to monitor fulfilment of the host city's obligations. With respect to entry visas for representatives of States Members of the United Nations, he said that the established three-week deadline for issuing such visas was not always observed in practice, and there were unjustified delays that hampered the participation of delegations in the work of the Organization. In that regard, the Russian Federation appreciated the support of the United States Mission in resolving specific problems, although it was noteworthy that, during the period covered by the report, nothing had been done to resolve the long-standing issue of travel restrictions imposed on some delegates and Secretariat officials. The Russian Federation urged the host country to adopt firm measures to solve that problem and supported the conclusions and recommendations set out in the report of the Committee.

13. **Mr. Kennedy** (United States of America) said that his country was proud and honoured to serve as host to the United Nations, and welcomed the remarks of those delegations that had positively recognized the host country's efforts. Along with that honour came a broad range of obligations and commitments that his Government had fulfilled since 1946 and to which it remained committed in future. The Committee on Relations with the Host Country was a valuable forum in which to discuss the issues relating to that task. The host country greatly valued the cooperation and constructive spirit of the members of the Committee, the assistance provided by the United Nations Secretariat in that regard, and the interest and participation of numerous observer delegations. The ability of delegations of States that were not members of the Committee to participate fully in its work had served to make the Committee's deliberations open to all and more representative. The Committee had been unusually responsive, especially given the fact that it was the only such Committee in any of the host countries that reported to the General Assembly.

14. Over the previous year, a principal focus of the Committee had been the implementation of the New York diplomatic parking programme, which the United States regarded as a success. The number of parking tickets issued to the diplomatic and consular corps in New York in 2004 had been much lower than in 2002, before the programme had come into effect. Congestion caused by illegal parking in the vicinity of the United Nations had been markedly reduced, and the programme had eased the daily lives and work of Permanent Representatives and New Yorkers alike. Nevertheless, a relatively small number of Missions had identified problems with some aspects of the implementation of the programme, and the United States Mission remained firmly committed to working with the authorities of the City of New York to ensure the proper functioning of the programme. The United States Mission pledged to uphold all its obligations to the United Nations community, just as it expected each member of the diplomatic community to respect local laws. The United Nations Legal Counsel had found the parking programme to be consistent with international law and practice and the United States would ensure that it continued to be implemented in conformity with such law and practice.

15. Some members of the Committee had objected to restrictions on private non-official travel by members of certain Missions. Such restrictions did not violate international law. Under the Headquarters Agreement, the host country was under an obligation only to provide mission members and delegations with unimpeded access to the Headquarters. The United States was not required to permit those individuals to travel to other parts of the country unless they did so on official United Nations business. That being said, however, the United States was pleased to report that

some restrictions imposed on certain delegations had been modified.

16. *Draft resolution A/C.6/59/L.15 was adopted without a vote.*

17. **Mrs. Ramos Rodriguez** (Cuba), speaking in exercise of the right of reply and in reference to the statement made by the representative of the United States on travel restrictions, said that the meeting held at Princeton University had dealt with a topic on the United Nations work programme, namely, the International Criminal Court. Cuba believed that the discriminatory policy imposed on certain delegations was a violation of customary international law on diplomatic privileges and immunities.

Agenda item 147: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/59/L.17)

Draft resolution A/C.6/59/L.17

18. **Mr. Mikulka** (Secretary of the Committee), referring to the programme budget implications of draft resolution A/C.6/59/L.17, said that under the terms of paragraph 2 of the draft resolution, the Special Committee on the Charter of the United Nations would hold its next session from 14 to 24 March 2005 and the total cost for conference servicing and documentation for that meeting in all six languages was estimated at $429,700 (at 2004-2005 rates). Since the session had already been programmed in the draft calendar of conferences and meetings for the biennium, no additional appropriation would be required.

19. Under the terms of paragraph 10 of the draft resolution, the Secretary-General was requested to pursue his efforts, within the level of the currently approved budget, to make all versions of the *Repertory of Practice of United Nations Organs* available in electronic format as soon as possible. To that effect, attention was drawn to section VI of General Assembly resolution 45/248 B of 21 December 1990, in which the General Assembly reaffirmed the responsibility of the Fifth Committee for administrative and budgetary matters and the role of the Advisory Committee on Administrative and Budgetary Questions. Similarly, the attention of the Committee was drawn to paragraph 67 of the report of the Advisory Committee on Administrative and Budgetary Questions (A/54/7) and to paragraph 31 of document A/C.5/54/SR.21, which indicated that the use of the phrase "within existing resources" or similar language in resolutions had a negative impact on the implementation of activities, and should therefore be avoided.

20. *Draft resolution A/C.6/59/L.17 was adopted without a vote.*

Draft resolution A/C.6/59/L.18

21. **The Chairman** drew the attention of the Committee to draft resolution A/C.6/59/L.18 entitled "Implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions", and announced that the former Yugoslav Republic of Macedonia had joined the sponsors of the draft resolution.

22. *Draft resolution A/C.6/59/L.18 was adopted without a vote.*

Agenda item 139: Responsibility of States for internationally wrongful acts (*continued*) (A/C.6/59/L.22)

Draft resolution A/C.6/59/L.22

23. *Draft resolution A/C.6/59/L.22 was adopted without a vote.*

Agenda item 138: Nationality of natural persons in relation to the succession of States (*continued*) (A/C.6/59/L.24)

Draft resolution A/C.6/59/L.24

24. **Ms. Telalian** (Greece) introduced the draft resolution entitled "Nationality of natural persons in relation to the succession of States" (A/C.6/59/L.24) and noted in particular that both the fifth preambular paragraph and paragraph 3 referred to the avoidance of statelessness as a result of a succession of States.

25. *Draft resolution A/C.6/59/L.24 was adopted without a vote.*

Agenda item 144: Report of the International Law Commission on the work of its fifty-sixth session (*continued*) (A/C.6/59/L.23)

Draft resolution A/C.6/59/L.23

26. **Mr. Simon** (Hungary) introduced the draft resolution entitled "Report of the International Law Commission on the work of its fifty-sixth session" (A/C.6/59/L.23), and said that the draft followed the model from the previous year with some minor changes. A new eighth preambular paragraph had been inserted welcoming initiatives to hold interactive debates, panel discussions and question time in the Sixth Committee. A new paragraph 2 expressing appreciation for the work of the International Law Commission had also been introduced. In subparagraph (a) of paragraph 4, the words "currently entitled" should be inserted before "Shared natural resources". Lastly, paragraph 5 endorsed the decision to include two new topics in the agenda.

27. **Mr. El Messallati** (Libyan Arab Jamahiriya) pointed out a grammatical error in the Arabic version of paragraph 2 of the draft resolution, which did not affect the other language versions.

28. *Draft resolution A/C.6/59/L.23 was adopted without a vote.*

Agenda item 149: Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (*continued*) (A/C.6/59/L.20)

Draft resolution A/C.6/59/L.20

29. **Ms. McIver** (New Zealand), introducing the draft resolution entitled "Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel" contained in document A/C.6/59/L.20, said that Andorra, Brazil, Cyprus, Czech Republic, Democratic Republic of the Congo, Estonia, Ethiopia, Ghana, Kenya, Lesotho, Latvia, Lithuania, Mali, Malta, Nigeria, Poland, Serbia and Montenegro, Solomon Islands, Thailand and Uganda had been added to the list of sponsors.

30. The draft resolution, which was based on previous resolutions adopted by the Committee, contained a new tenth preambular paragraph paying tribute to the courage of those staff members who had lost their lives in the course of their duties. In addition, the fourteenth preambular paragraph made specific reference to the recommendations of the Working Group of the Sixth Committee. With regard to paragraph 11, the Secretariat had advised that the Ad Hoc Committee would meet from 11 to 15 April 2005.

31. **Mr. Mikulka** (Secretary of the Committee) said, with reference to the programme budget implications arising from draft resolution A/C.6/59/L.20, that the scheduled reconvening of the Ad Hoc Committee for five days (from 11 to 15 April 2005) with simultaneous interpretation in six languages and documentation totalling 61 pages would entail an estimated cost of $240,900 (at 2004-2005 rates). Since the meetings had already been programmed in the draft calendar of conferences and meetings for the biennium 2004-2005, no additional appropriation would be required.

32. *Draft resolution A/C.6/59/L.20 was adopted without a vote.*

Agenda item 148: Measures to eliminate international terrorism (*continued*) (A/C.6/59/L.19)

Draft resolution A/C.6/59/L.19

33. **Mr. Adsett** (Canada), introducing the draft resolution entitled "Measures to eliminate international terrorism" contained in document A/C.6/59/L.19, said that it was based on General Assembly resolution 58/81, with the addition of a mention of the tenth anniversary of the adoption of the Declaration on Measures to Eliminate International Terrorism in the fourth preambular paragraph, new sixteenth and seventeenth preambular paragraphs and three new paragraphs (6, 7 and 13) in the operative part. In addition, an annex had been added to the draft resolution listing the regional developments and initiatives in the past year.

34. **Mr. Mikulka** (Secretary of the Committee), explaining the implications of draft resolution A/C.6/59/L.19 for the programme budget for the biennium 2004-2005, said that the Ad Hoc Committee was to meet from 28 March to 1 April 2005 with two meetings per day with the corresponding interpretation and documentation services for a total cost of $384,300 (at 2004-2005 rates). Since the meetings had already been programmed in the draft calendar of conferences and meetings for the biennium 2004-2005, no additional appropriation would be required if the General Assembly adopted the draft resolution.

35. Following the adoption of the draft resolution, the Office of Legal Affairs would contact the Department of Political Affairs, the Department for Disarmament Affairs, the United Nations Office on Drugs and Crime and the Office of the High Commissioner for Human Rights to have them provide their contribution to the Secretary-General's annual report on measures to eliminate international terrorism. Such contributions were already reflected in the programme of work of the departments concerned; hence, there would be no need to appropriate additional funds if the General Assembly adopted the draft resolution.

36. *Draft resolution A/C.6/59/L.19 was adopted without a vote.*

37. **Mr. Toro Jiménez** (Bolivarian Republic of Venezuela), speaking in explanation of position, said that Venezuela had joined the consensus because, in the fight against terrorism, suppression was an approach that in the end yielded limited and conflicting results. The right approach was a different one; it entailed going to the roots of the problem and the motives that made terrorism possible and continued to feed into it, in other words, the dramatic conjunction of hunger, poverty, abandonment, social exclusion and the obstacles created by neoliberal policies that thwarted development. These issues deserved to be addressed as a matter of priority, as the President of the Bolivarian Republic of Venezuela had stated at a number of summits of Heads of State. Venezuela hoped that its warning would not go unheeded.

38. **Mr. Chaabani** (Tunisia), speaking in explanation of position, said that Tunisia welcomed the consensus that had made it possible to adopt draft resolution A/C.6/59/L.19. Among the other relevant initiatives referred to in the eighteenth preambular paragraph was that proposed by Tunisia, which involved the elaboration of a consensual code of conduct against terrorism under the auspices of the United Nations. That initiative had the support of a number of regional and political groups, including the African Union, the Non-Aligned Movement and the Organization of the Islamic Conference. Tunisia reserved the right to refer to that initiative again at the opportune moment.

39. **The Chairman** said that, pursuant to General Assembly resolution 58/316, each Main Committee should adopt a provisional programme of work at the end of the session for the next session. The Bureau had therefore prepared a provisional programme of work, which had been circulated. The purpose of the provisional programme of work was to facilitate the preparation of the documentation needed for the next session. Once the new Bureau had been elected and the Committee met during the sixtieth session, the programme of work could be reviewed and amended. He therefore suggested that the Committee should take note of the provisional programme of work.

40. *It was so decided.*

41. **Mr. Rosand** (United States of America), **Mr. Hmoud** (Jordan) and **Mr. Kanu** (Sierra Leone) spoke briefly on procedural matters relating to the provisional programme of work for the sixtieth session of the General Assembly.

42. **The Chairman** said, with respect to the election of the officers of the Main Committees, he understood that in due course consultations would be held among the regional groups, so that at the proper time, at least three months prior to the opening of the sixtieth session of the General Assembly, the Sixth Committee could elect its new chairman, three vice-chairmen and a rapporteur. The Chairman then asked the representatives to answer two questionnaires related to conference services.

The meeting was suspended to give representatives an opportunity to answer the questionnaires.

The meeting rose at 12.05 p.m.

United Nations A/C.6/59/SR.27

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Chairman: Mr. Bennouna ..... (Morocco)

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The meeting was called to order at 3.35 p.m.

Agenda item 146: International Criminal Court (*continued*) (A/C.6/59/L.25 and Corr.1)

1. **Mr. Peersman** (Netherlands), introducing draft resolution A/C.6/59/L.25 and Corr.1 on behalf of the Bureau, said that a further revision should be made to corrigendum 1: the last reference to the Relationship Agreement in the fourth preambular paragraph should be accompanied by a footnote, numbered 4, reading "Articles 10 and 13 of the Relationship Agreement".

2. **Mr. Rosand** (United States of America), speaking in explanation of position, said that his delegation could not join the consensus on the draft resolution. Its opposition to the Rome Statute remained unchanged. First, it remained deeply concerned about the danger of politically motivated prosecutions: nothing about the structure of the International Criminal Court provided any guarantee against that eventuality. Secondly, the Court was flawed in the related areas of jurisdiction and due process. Its authority was not constrained by adequate checks or balances. For example, it had a self-initiating prosecutor answerable to no State or institution other than two judges on a three-judge panel of the Court itself. Final judgements were exempt from any clemency review by a political authority. His delegation could not accept the Court's jurisdiction. Moreover, despite the Security Council's role under the Charter of the United Nations, the Rome Statute suggested that the Assembly of States Parties was competent to define instances of aggression.

3. He recalled that the Court was an independent body and not a part of the United Nations system. The Relationship Agreement approved under General Assembly resolution 58/318 did not bind States not parties to the Rome Statute to the financial implications of the Court's activities and required full reimbursement of all expenses incurred by the United Nations.

4. The fact that his delegation felt unable to join the Court stemmed from its commitment to the rule of law, and specifically to international accountability for war crimes, genocide and crimes against humanity. It was regrettable that the Security Council had failed to renew a resolution requesting the Court not to commence or proceed with the investigation or prosecution of personnel from non-parties to the Rome Statute in respect of acts or omissions connected with their participation in United Nations missions. The absence of successors to Security Council resolutions 1422 (2002) and 1487 (2003) reflected the demise of a compromise that had respected the strongly held views of those who supported the Court and the equally strongly held views of those who did not.

5. In accordance with article 98 of the Rome Statute, his Government had signed agreements with 96 nations, to date, to ensure that United States citizens and military personnel were not surrendered to the Court. There was a growing consensus that such agreements were an important mechanism to protect States not parties to the Statute from the Court's claims of jurisdiction. Indeed, as many nations — 97, including his own — had signed agreements under article 98 as had taken the final step to join the Court. His delegation therefore asked that its decision not to be a party to the Statute should be respected. It was grateful to the European Union for its flexibility in ensuring that the modus vivendi that had been reached could continue.

6. *Draft resolution A/C.6/59/L.25 and Corr.1, as orally revised, was adopted.*

7. **Mr. Adsett** (Canada), speaking in explanation of position, said that the adoption of the draft resolution emphasized the importance attached by the international community to the International Criminal Court. His delegation was, however, deeply disturbed by what appeared to be continuing efforts to undermine the Court's legitimate and necessary role in the international legal system. The right of any State not to become a party to the Rome Statute must be respected, but States non-parties should also be respectful of the rights of States that had chosen to become parties to the Statute, in particular their right to nurture the Court without hindrance and ensure that it become the responsible and effective judicial mechanism it was described to be and indeed had already became. Even if some delegations had misgivings about the Statute, all were agreed on the importance of ending the culture of impunity that had been allowed to flourish in international law for too long. Efforts to undermine the Court gave encouragement to the forces of impunity and were therefore inimical to the interests of the whole international community.

The meeting was suspended from 3.50 p.m. to 4.35 p.m.

Agenda item 150: International convention against the reproductive cloning of human beings (*continued*) (A/C.6/59/L.2, 8 and 26)

8. **The Chairman** announced that the Comoros, Guyana and Norway had joined the sponsors of draft resolution A/C.6/59/L.2, while Angola, Chile and Malawi had withdrawn as sponsors of the same draft resolution. Noting that draft resolutions A/C.6/59/L.2 and A/C.6/59/L.8 had been introduced at the eleventh meeting of the Committee, he invited the representative of Italy to introduce draft resolution A/C.6/59/L.26.

9. **Mr. Nesi** (Italy), introducing draft resolution A/C.6/59/L.26, said that the draft United Nations Declaration on Human Cloning, annexed to the draft resolution, had been the subject of intensive consultations and the text that had emerged enjoyed broad support. He therefore hoped that it could soon be finalized.

10. **The Chairman** said that it was unacceptable for the international community to be divided on a topic of concern to all. Following informal consultations with interested delegations, therefore, he suggested that the Committee should establish a working group that would finalize the text of the declaration, on the basis of draft resolution A/C.6/59/L.26 and, after holding three meetings early in 2005, would report to the Committee during the current session.

11. **Mr. Mikulka** (Secretary of the Committee) said that, since the Committee would be unable to complete its work as scheduled, it intended to meet in February 2005, preferably in lieu of the meeting of the Ad Hoc Committee on an International Convention against the Reproductive Human Cloning of Human Beings, which had already been included in the revised draft calendar of conferences and meetings for 2005. The meetings, to be held on 14, 15 and 18 February 2005, would comprise five meetings of the working group and one of the Committee. All the meetings would require simultaneous interpretation in all six official languages. The meeting of the Committee would require summary records, while the documentary requirements for the working group would be 20 pages of pre-session, 16 pages of in-session and 10 pages of post-session documentation to be issued in all six languages. The five meetings of the working group would have no financial implications for the regular budget, but conference servicing requirements for the meeting of the Committee on 18 February 2005 were estimated at US$ 37,500, at 2004-2005 rates.

12. **The Chairman** read out the following proposal:

> "The Sixth Committee establishes a Working Group to finalize the text of a United Nations declaration on human cloning, on the basis of draft resolution A/C.6/59/L.26, and to report to the Sixth Committee during the current session. The Working Group shall meet on 14, 15 and 18 February 2005. The Sixth Committee will meet in the afternoon of 18 February to consider and take action on the report of the Working Group.
>
> "The Working Group shall be open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency,
>
> "The Chairman of the Sixth Committee shall be the Chairman of the Working Group and members of the Bureau of the Sixth Committee shall serve as Friends of the Chairman."

13. *The proposal was adopted.*

Agenda item 148: Measures to eliminate international terrorism (*continued*)

14. **Mr. Lobach** (Russian Federation) said that he wished to inform the Committee of progress in the intensive informal consultations being held on international terrorism, and specifically on the draft convention on the suppression of acts of nuclear terrorism, with a view to overcoming the last remaining obstacles to agreement on a consensus text before the end of the session. Such a text was likely to be forthcoming over the next few days. A decision would then have to be reached on how best to proceed. His delegation would hold consultations with all interested delegations on whether the draft convention could be sent direct to the General Assembly or whether it should first be considered by the Committee.

15. **The Chairman** said that, since the Committee had concluded its consideration of the agenda item, the proposal by the Russian Federation should be considered at the appropriate level in accordance with the rules of procedure of the General Assembly.

16. After an exchange of courtesies, in which **Mr. Castellón Duarte** (Nicaragua), **Mr. Fanti** (Gambia),

Mr. Sinaga (Indonesia), **Mr. Leon Romeiro** (Brazil), **Ms. Tuğral** (Turkey), and **Ms. McIver** (New Zealand), spoke on behalf of the regional groups of States, **the Chairman** said that the Committee would take up the provisional programme of work of the Sixth Committee for the sixtieth session when it resumed its work in February 2005.

The meeting rose at 5.10 p.m.